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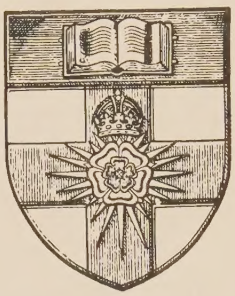

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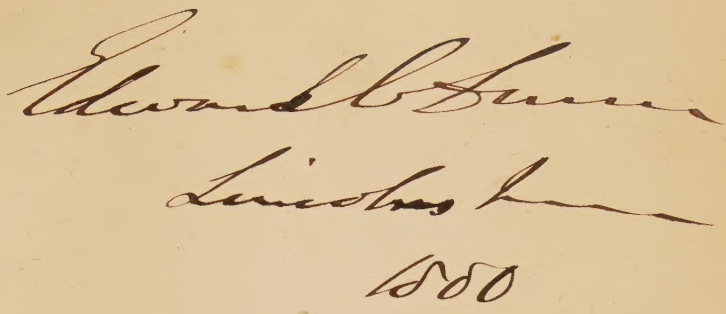

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AND

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DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE QUEEN'S BENCH DIVISION

AND BY THE

COURT FOR CROWN CASES RESERVED

XLII VICTORIA.

THE GUARDIANS OF THE WOODSTOCK UNION, APPELLANTS; THE CHURCHWARDENS, OVERSEERS, AND DIRECTORS OF THE POOR OF THE PARISH OF ST. PANCRAS, RESPONDENTS.

1878
Nov. 9.

Poor Law—Settlement—The Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 35—Abolition of Derivative Settlement.

A pauper was born in the parish of P. The pauper's father was born in the parish of D. Neither the pauper nor the pauper's father had acquired a settlement. The pauper's paternal grandfather had acquired a settlement by serving the office of parish constable in the parish of M., while the father of the pauper was under sixteen years of age and unemancipated:—

Held, that under the 35th section of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), the pauper was not settled in the parish of D., but must be deemed to be settled in the parish of P.

CASE stated from the Middlesex Sessions. The appeal was against an order of removal adjudging the last legal settlement of Emily Taylor to be in the parish of Deddington, in the appellant union. The Sessions quashed the order, subject to a case, the facts of which were as follows.

Emily Taylor became chargeable to St. Pancras, and was by the order of removal on the 12th of June, 1877, adjudged to

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be legally settled in the parish of Deddington, in the Woodstock union. The said Emily Taylor, the pauper, was born in the parish of St. Pancras, on the 16th of April, 1859, and had acquired no settlement in her own right. She was the lawful daughter of George Taylor. George Taylor was born in the parish of Deddington on the 1st of January, 1815, and acquired no settlement in his own right. The pauper's father, the said George Taylor, was the lawful son of William and Martha Taylor, both deceased. In 1829 William Taylor, the grandfather, acquired a settlement by serving the office of parish constable in the parish of Milton, a parish comprised in the Banbury Poor Law Union, George Taylor being then under the age of sixteen, and unemancipated. The appellants, on the hearing of the appeal, contended that the case came within the last part of section 35 of 39 & 40 Vict. c. 61; that the pauper's settlement could not be ascertained without inquiring into her father's derivative settlement, and that she must therefore be deemed to be settled in the parish of St. Pancras, where she was born. The respondents contended that the pauper derived a settlement from her father, and that as he was born in the parish of Deddington, that was his settlement, and that it could therefore be shewn that the parish of Deddington was her settlement, without inquiring into the derivative settlement of her parent.

The question for the Court was whether the settlement of the pauper was in the parish of Deddington. (1)

Besley, for the appellants. The pauper's father never had a settlement in Deddington. Primâ facie, Deddington was his settlement as being the place of his birth, but directly it is proved that

(1) The 35th section of 39 & 40 Vict. c. 61, enacts that "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

"If any child in this section mentioned shall not have acquired a settlement for itself, or, being a female, shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

his father had a settlement, he takes that settlement, not a birth settlement. The daughter cannot derive from the father a settlement which he never had. The case comes within the exact words of the 35th section of 39 & 40 Vict. c. 61, and as the settlement of the pauper cannot be ascertained without inquiring into the derivative settlement of her parent, she must be deemed to be settled where she was born, and that is in the respondent parish.

Poland, and *Lumley*, for the respondents. The obvious intention of the statute was to prevent inquiries into the derivative settlement of the parent. Such inquiries were the source of great trouble and expense at sessions. The effect of the section is to abolish all derivation of settlements except that of the wife from the husband, and that of the child from the parent of the parent's non-derivative settlement. In finding out the settlement of a pauper, therefore, you cannot look to the grandfather's settlement. It must be treated as non-existent. The clause at the end of s. 35 is meant to apply only to cases where the parent has no settlement but his derivative settlement. The absurdity resulting from the appellants' construction of the Act is that, whereas the intention is to abolish derivative settlements going further back than the immediate parent, and the complicated and expensive inquiries to which they give rise, according to the appellants' construction you must inquire into the derivative settlement of the parent for the purpose of sending the pauper, not to that settlement, but to his birth settlement. A man may be said to have his birth settlement in one sense, even though he has another settlement. It exists potentially, to use the language of Coleridge, J., in *Reg.* v. *All Saints, Derby.* (1) If it were possible that the place of the other settlement should cease to exist, the pauper would have his birth settlement. There is no greater anomaly involved in the suggestion that the pauper should be removable to the father's birth settlement, though at the time it be not the place of settlement to which the father is removable, than there is in the fact that paupers are constantly removed to the place of their own birth settlement or their father's birth settlement when it is perfectly certain that the grandfather's settlement, if it could be found out, is the true place of their settlement. In the absence of

(1) 14 Q. B. 207.

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the necessary proof of the grandfather's settlement, it is necessary to remove to some other place of settlement. The effect of the statute is to say that no proof of any settlement further back than the parent shall be admitted, leaving the case in precisely the same position as if the proof of any settlement further back could not be found. The fact that this construction may involve the parent and child being removable to different places affords no argument, for the appellants' contention does so also.

MELLOR, J. The respondents cannot succeed unless the pauper is settled in Deddington. I cannot come to the conclusion that she is. Her father had only primâ facie a settlement in Deddington, that is to say, he would take that settlement if no other settlement could have been shewn, but his father had acquired a settlement in Milton which he took. I do not see how the pauper could be settled in Deddington, and therefore she must be settled in St. Pancras, where she was born.

FIELD, J. I think the order of Sessions was right, and must be affirmed. I do not think the pauper was settled in Deddington. The 35th section of the Act abolishes derivative settlement, with certain exceptions. It makes an exception in the case of a wife and of a child under sixteen, which is to take the settlement of its father or of its widowed mother, as the case may be, up to that age, and retain that settlement until it shall acquire another. So if the child acquires no settlement, it is to have the father's settlement. The father here was born in Deddington. But his birthplace is only primâ facie his place of settlement. If his father had a settlement elsewhere, he had that settlement. The section, however, provides that in inquiring into the settlement of the child, if you cannot ascertain what settlement the child takes without inquiring into the father's derivative settlement, the child shall be deemed to be settled, not in the father's place of settlement, but where he or she was born. It seems to me that the effect of the section clearly is that the pauper was settled in St. Pancras.

Order of Sessions affirmed.

Solicitors for appellants: *White & Sons.*
Solicitor for respondents: *Rexworthy.*

EARL MANVERS AND BROWNE *v.* BARTHOLOMEW. 1878 *Nov.* 12.

Highway, Materials for Repair of—Licence to get in Inclosed Lands—Duration of Licence—5 & 6 Wm. 4, c. 50, ss. 53, 54.

A licence granted by justices to get materials from inclosed land for the repair of the highways under 5 & 6 Wm. 4, c. 50, ss. 53, 54, does not continue indefinitely, but is limited to the necessities of the particular occasion in respect of which it was granted.

SPECIAL CASE stated pursuant to the provisions of Order XXXIV., Rule 1.

The plaintiff Browne was the tenant of a farm in the parish of Langton-by-Wragby, in the county of Lincoln, to the plaintiff Lord Manvers, who was the owner thereof, and the defendant was, during the year 1877, the surveyor of highways for the parish.

In 1866, materials being required for the repair of the highways in the parish, the then surveyor of highways (not the defendant), pursuant to the provisions of the General Highway Act, 5 & 6 Wm. 4, c. 50, s. 53, gave notice to the plaintiffs, as the owner and occupier respectively of the said farm, requiring them to appear before justices at special sessions, to shew cause why materials for the repair of the highways should not be had from a field forming part of the farm, which field was inclosed land within the meaning of the said Act and of 4 & 5 Vict. c. 51.

The justices in special sessions granted their licence under s. 54 of 5 & 6 Wm. 4, c. 50, to the surveyor, authorizing him to dig, get, take, and carry away from the field materials for the purposes aforesaid, making satisfaction for the same and for damage done to such field in the manner described by the Act.

The licence was in the form given in the schedule to the General Highway Act. The surveyor accordingly dug in and carried away from the field such materials as aforesaid, and with them repaired the highways in the parish.

In subsequent years, down to 1877, the different surveyors of highways appointed each year for the parish got materials for the repair of the highways in the parish from the said field, and

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paid the plaintiffs from time to time sums agreed upon as the price of such materials. In 1877 notice was served on the defendant by the plaintiffs, requiring him not to trespass on or dig or carry away materials from the field. Notwithstanding which, the defendant claiming to act under the licence aforesaid, dug and carried away stone and other materials therefrom for the repair of the highways, and thereby injured the reversion of the plaintiff Earl Manvers.

The question for the opinion of the Court was, whether the defendant was justified in entering upon and digging and carrying away from the said land of the plaintiffs stone and other materials for the repair of the highways in the parish.

Graham, for the plaintiffs. It is contended that the licence given by the justices to dig materials on inclosed ground for the repair of the highways, under 5 & 6 Wm. 4, c. 50, ss. 53, 54, is limited to the particular repairs then requiring to be done. It cannot be that such a licence is intended to last for all time. The circumstances of the case might entirely alter, and the consequences might be to entail an undue burden on the particular landowner.

Lumley, for the defendant. The licence to get materials under s. 54 on inclosed land can only be granted when no materials can be conveniently got from common lands, &c., under s. 51. The necessity for repairs of the highways is constantly arising from time to time. The convenience of the thing is that the justices should have authority to license the surveyor to take materials from the piece of land selected, from time to time as occasion may require in the future, as long as any materials can be conveniently procured there. It would be very inconvenient that the surveyors should be continually having to make fresh applications, and open fresh gravel pits in different places, as often as the highway needed repair. The words of ss. 53 and 54 of the Act are capable of either construction, and the Court may therefore look to the convenience of the thing. The form of licence given in the schedule which mentions no time, tends to shew that though the magistrates might, no doubt, have limited the licence to "such times or time as to them should seem proper," they might also, if they thought

proper, grant a licence for an unlimited time. No hardship would arise, because the 54th section provides for compensation.

COCKBURN, C.J. I am of opinion that the judgment must be for the plaintiffs. The authority given by the Act involves an interference with the rights of private property and must be construed strictly. The section which authorizes the justices to grant their licence expressly says that they may give a licence to dig, take, and carry away such materials, "at such times or time as to such justices shall seem proper." In the form of licence given in the schedule no time is mentioned, but nevertheless I think that these words in the enacting clause are not immaterial, and furnish a key to the construction of the Act. I think they shew that the licence was not intended to be for all future time but for a certain definite occasion. There seems to be abundant reason why this should be the case. It might be a very unfair proceeding to take from one man's land continually large quantities of materials, while there existed similar materials on lands of his neighbours, who ought in justice to bear their share of inconvenience for the public good. It is suggested that there is provision for compensation in the section, but people do not always feel that interference with proprietary right is adequately compensated for by the power of setting up a very contingent and uncertain kind of claim.

The true view seems to me to be that the authority which the justices may give to the surveyor is coextensive with the existing necessity for materials, with reference to which the application for the licence is made. I cannot think that the licence is to apply at any future time when the state of things may be wholly different; when for instance a much larger quantity of materials may be required, and it might be unjust to throw the onus of furnishing the whole of them on the same piece of land.

The true construction of the Act as derived from the justice of the thing, and the language used, appears to me to be that the licence is to be granted pro re natâ, and must be limited to the necessities of the occasion.

MELLOR, J. I am of the same opinion. I think that difficulties may arise, such as were suggested in argument, from the construction

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we put on the statute, but it appears to me that the countervailing difficulties in the way of the opposite construction are far greater. It seems to me that the meaning of the statute is sufficiently clear. The surveyor is by the section to get a licence, to take and carry away so much of the said materials as by the discretion of the said surveyor shall be thought necessary to be employed in the amendment of the said highways. He is to estimate the quantity of materials that will be necessary, and it is only with reference to the repairs so contemplated, and the materials estimated to be necessary for them, that the justices are to give authority to get materials. The order is, in my opinion, to extend only to the exigencies of the particular occasion. When the necessity for fresh repairs arises, the former licence being spent, the surveyor must come again for a fresh authority to get further materials. The justices are to exercise their jurisdiction with reference to the circumstances of the particular occasion, the quantity of materials required, the place from which it is required to get them, and so forth. I do not say that the licence must necessarily be given year by year, or for any particular time, but I think it cannot be looked on as absolutely indefinite. It must have some reasonable limits, with reference to the particular circumstances of the existing necessity, to provide for which it was given.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Toynbee, for Toynbee & Larken.*

Solicitors for defendant: *Taylor, Hoare, & Taylor, for Burtons & Scorer.*

PAUL AND ANOTHER, APPELLANTS; SUMMERHAYES, RESPONDENT. 1878 *Nov.* 16.

Trespass to Land—Foxhunting.

A person is not justified in entering the land of another against his will for the purposes of the sport of foxhunting.

Gundry v. *Feltham* (1 T. R. 334) discussed.

CASE stated by justices under 20 & 21 Vict. c. 43, upon a conviction of the appellants upon an information for an assault.

The appellants were persons who, on the occasion in question, were engaged in hunting with a pack of foxhounds. In the pursuit of a fox, which the hounds were running, the appellants sought to enter upon a field forming part of a farm belonging to the respondent's father, which the respondent managed on his father's behalf. The respondent warned them off, and endeavoured to resist their entry on the field. For the purpose of overcoming his resistance to their entry, they committed the assault complained of, and the main question in the case was whether, under the above-mentioned circumstances, there was any justification for the assault. The justices convicted the appellants in the sums of 20*s.* and 10*s.* respectively.

Cole, Q.C., for the appellants. The case of *Gundry* v. *Feltham* (1) is authority to shew that persons in fresh pursuit of a fox have a right to go on the land of another. No doubt the principle of that decision depends upon the notion that the destruction of a noxious animal is for the good of the public, and the motive of the modern sport of foxhunting is certainly not the destruction of a noxious animal. But it is contended that the motive is immaterial. The law has always given the right, because it favours the destruction of foxes, and the effect is the same whatever the motive. [He also cited *Mitten* v. *Faudrye* (2); Year Book, 12 Hen. 8, p. 10, and 1 & 2 Wm. 4, c. 32, ss. 31–35.]

Charles, Q.C. The 1 & 2 Wm. 4, c. 32, has no bearing on the present case. It relates to trespassers in pursuit of game, and a fox is not game. It leaves the question as to a justification at

(1) 1 T. R. 334. (2) Poph. 161.

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common law quite untouched. The case of *Gundry* v. *Feltham* (1) is distinguishable. There the demurrer admitted that the means adopted were the only means of killing the fox. Now, it cannot be contended that the modern mode of foxhunting is essential to the killing of the fox. The case of *Gundry* v. *Feltham* (1) was cited to Lord Ellenborough sitting at Nisi Prius in *Lord Essex* v. *Capel* (2), and that learned judge was of opinion that the principle upon which it went was inapplicable to the modern sport of foxhunting pursued as a diversion, and held that that sport can only be pursued on the land of another by his consent. [He cited *Baker* v. *Berkeley*. (3)]

Cole, Q.C., in reply.

LORD COLERIDGE, C.J. I am of opinion that the conviction should be affirmed. The statute 1 & 2 Wm. 4, c. 32, s. 35, really has no application to the case. That section of the statute merely provides that certain foregoing provisions shall not apply to persons in fresh pursuit of a fox. But, in truth, when the statute is examined, it will be seen that those provisions would not apply to the pursuit of the fox, the animal not being game. So the provisions of s. 35 seem only to have been put in ex majori cautelâ, to prevent certain penalties for a particular class of trespass, viz. trespass in pursuit of game, from applying to foxhunters. There is nothing, therefore, in the Act to alter the common law with regard to trespass so far as concerns foxhunting. The real question is whether under the circumstances the respondent was justified in resisting the entry of the appellants on his father's land. I am of opinion that he was. It was suggested that there is authority that foxhunting in the popular, well understood, sense of the term, that is, as a sport, can be carried on over the land of a person without his consent and against his will, and the case of *Gundry* v. *Feltham* (1) was cited as authority for that proposition. I am of opinion that no such right as that claimed exists. The sport of foxhunting must be carried on in subordination to the ordinary rights of property. Questions such as the present fortunately do not often arise, because those who pursue the sport

(1) 1 T. R. 334.
(2) Locke on Game Laws, 5th ed. 45; Chitty on Game Laws, 2nd ed. 32.
(3) 3 C. & P. 32.

of foxhunting do so in a reasonable spirit, and only go upon the lands of those whose consent is expressly, or may be assumed to be tacitly, given. There is no principle of law that justifies trespassing over the lands of others for the purpose of foxhunting. The case of *Gundry* v. *Feltham* (1) is distinguishable from the present case, and can be supported, if it is to be supported at all, only on the grounds suggested by Lord Ellenborough in the case of *Lord Essex* v. *Capel* (2), to which we have been referred. The demurrer admitted that what was done was the only means for destroying the fox, and Buller, J., expressly puts his decision on that ground. The case was brought under the consideration of Lord Ellenborough in *Lord Essex* v. *Capel* (2), and he was distinctly of opinion that, where any other object was involved than that of the destruction of a noxious animal, an entry on the land of another, against his will, could not be justified. In the case of *Lord Essex* v. *Capel* (2) it had been pleaded that the means adopted were the only means, and also that they were the ordinary and proper means of destroying the fox. But the evidence clearly shewed that in the case of foxhunting, as ordinarily pursued, the object of destroying the animal is only collateral. The interest and excitement of the chase is the main object. Lord Ellenborough, than whom there could be no higher authority on such a point, was of opinion that where this was the case, and where the real object was not the mere destruction of a noxious animal, a trespass could not be justified. If persons pursue the fox for the purpose of sport or diversion, they must do so subject to the ordinary rights of property. It would seem that there may be some doubt as to the validity of the justification even where the only object is the destruction of a noxious animal. The idea that there was such a right as that of pursuing a fox on another's land appears to have been based on a mere dictum of Brook, J., in the Year Book, 12 Hen. 8, p. 10. This dictum was not necessary for the decision of the case, for there the chasing of a fox was not in question, and the case went off on an entirely different point. It may well be doubted in my opinion whether, even if the case were one in which the destruction of a fox as a noxious animal was the sole object, there would be any justification. That

(1) 1 T. R. 334. (2) Locke on Game Laws, 45.

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question, however, does not, I think, arise here. It is enough to say that the case of *Gundry* v. *Feltham* (1), and the dictum of Brook, J., in the Year Book, 12 Hen. 8, p. 10, do not at all conflict with the opinion expressed by Lord Ellenborough in *Lord Essex* v. *Capel* (2), which appears to me to be the true view of the law, viz. that a person has no right, in the pursuit of the fox as a sport, to come upon the land of another against his will. For these reasons our judgment must be for the respondent.

MELLOR, J. I am of the same opinion. The 1 & 2 Wm. 4, c. 32, has really no application to the case. The 31st section of the Act contains certain provisions for preventing trespasses in pursuit of game. Foxes, however, are not game, and so not within the provisions of the section. In any case the exception in favour of foxhunting in the 35th section could only apply to the special provisions of the Act for the protection of game, and could not affect the question whether a trespass could be justified at common law in the course of hunting a fox, which is the real question in the case. That question has been fully discussed by my Lord. The counsel for the appellants did not venture to insist, in contravention of all common sense and experience, that the object of foxhunting, as ordinarily pursued, was the destruction of a noxious animal which does mischief to farmers and others. The case of *Gundry* v. *Feltham* (1) is therefore distinguishable. The view taken by Lord Ellenborough in the case of *Lord Essex* v. *Capel* (2), in which the question was really the same as that in the present case, was quite consistent with the decision in *Gundry* v. *Feltham* (1), and it appears to me to be the only view that is possible consistently with common sense and the ordinary rights of property.

Judgment for the respondent.

Solicitors for appellants: *Coode & Co.*
Solicitors for respondent: *Read & Lovell.*

(1) 1 T. R. 334.

(2) Locke on Game Laws, 45.

SPENCER AND ANOTHER *v.* SLATER AND OTHERS.

1878
Nov. 19.

Fraudulent Conveyance—13 *Eliz. c.* 5—*Delaying Creditors.*

A debtor in insolvent circumstances executed a deed by which he conveyed all his estate to trustees on trust to carry on his business, or get in and realise his estate in the manner they might deem expedient, and apportion the residue of the proceeds after payment of expenses, &c., according to an equal pound rate among his creditors. It was provided by the deed that a dividend should only be payable to a creditor on his executing or assenting to the deed; and that, if within a certain time any creditor did not execute or assent, his dividend should be paid by the trustees to the debtor. The deed also provided that the executing and assenting creditors should indemnify the trustees against any personal loss or risk they might sustain, otherwise than by their own wilful negligence or default, by reason of their proceedings under the deed:—

Held, that the deed was fraudulent and void under 13 Eliz. c. 5, as tending to defeat or delay creditors.

12 C.L.D. 318
322
54 L.J.Q.B. 47
50 L.T. 412
20 C.L.D. 391

SPECIAL CASE stated in an interpleader issue between the plaintiffs, the trustees under a deed of assignment hereinafter mentioned, and the defendants, the execution-creditors of one Thomas Keating.

The facts were as follows:—

On the 23rd of July, 1877, a deed was made between Thomas Keating, thereinafter styled "the said debtor," of the first part, the plaintiffs, thereinafter styled "the trustees," of the second part, and the several creditors of the debtor, who should execute the deed or otherwise signify their assent thereto before the declaration of a dividend, of the third part.

The deed assigned all the debtor's estate and effects to the trustees on the conditions and trusts, and for the purposes thereinafter declared, viz.:—

1st. To carry on the business of the debtor, or to get in and realise his estate in such manner as the trustees may deem expedient, and out of the proceeds to pay all fair and usual charges attending the liquidation thereof or incidental thereto; and all rent, taxes, salaries, and preferable claims that would be payable in bankruptcy; and then to apportion the residue according to an equal pound rate to all creditors parties hereto, or of whose claims the trustees shall have received notice, and have

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no sufficient grounds to dispute or shall dispute the same unsuccessfully.

2nd. The execution of this deed, or the assent thereto by any creditor, shall operate as a full release to the debtor in respect of the debt of such creditor so executing these presents or assenting thereto.

3rd. The dividend so apportioned to every creditor as aforesaid shall be paid to him, her, or them severally, provided he, she, or they have executed these presents or assented thereto as aforesaid. And on the expiration of twelve calendar months from the date hereof the debtor may apply to the trustees to be paid the dividend or dividends of any creditor or creditors who have neglected or refused to assent hereto or execute this deed; and thereupon the trustees shall give such creditor or creditors written notice by post of such application made by the debtor; and if such creditor or creditors shall for seven days thereafter still neglect or refuse to execute these presents or assent hereto, such dividend or dividends shall be then forthwith paid to the debtor by the trustees.

4th. The trustees may require full particulars relating to the debt of any creditor, and that such debt be verified on oath or by statutory declaration, before admitting such debt or paying dividends thereon.

5th. All matters not herein specially provided for shall be dealt with on principles applicable under the present English bankruptcy law.

7th. And lastly, the several parties hereto, of the third part, do hereby severally, in proportion to their respective claims, covenant, promise, and agree with the trustees to hold them harmless and indemnified from all personal risk, loss, or damage they may sustain by reason of their proceedings under the trusts hereof, excepting such loss or damage as may result from their own wilful negligence or default, and to hold them harmless and indemnified against any claim or claims by any person or persons of which they may not have received notice before making a dividend, and from and against any claim by any future trustee or trustees of the estate and effects of the debtor, and from and against any order of any Court made in respect of the debtor or

his estate, or of this deed and the trusts thereof, or any of them, and from and against all costs, damages, and expenses thereof, consequent thereon or incidental thereto.

On the 3rd of August, 1877, the defendants obtained a judgment against the debtor for 49*l.*, and on the same day a writ of fi. fa. was delivered to the sheriff of Lancashire, indorsed to levy the amount of the judgment without any costs.

On the 14th of August the sheriff seized the goods in question under the fi. fa., such goods forming part of the property included in the deed.

The goods were, at the time of the seizure, on premises consisting of a house and shop occupied by the debtor, but from the 22nd of July, 1877, up to the time of the seizure, a person employed by the plaintiffs was on the premises to keep possession of the goods for the plaintiffs. On such taking possession of the goods by the plaintiffs the shop was closed. No business was carried on in the shop, nor was the same open to the public. No other indication of any change of possession was visible or open to the public, but the plaintiffs had advertised the property for sale by tender before the seizure under the execution, and had nearly concluded a bonâ fide sale for value of the said property, but the seizure prevented the actual sale and delivering over of the said goods.

The execution-debtor was a trader within the meaning of the Bankruptcy Act, 1869, when he executed the deed, and was then indebted to several creditors respectively, whose debts respectively amounted to 50*l.* and upwards. He was in insolvent circumstances when he executed the deed, and he executed it for the purpose of defeating any execution, including an execution at the suit of the defendants, which was then apprehended by him, and which execution might prevent the equal distribution of the debtor's property among all his creditors, and also for the purposes stated in the said deed.

The question for the Court was whether the goods seized by the sheriff or any of them were, at the time of the seizure, the property of the plaintiffs as against the defendants.

Crompton, for the plaintiffs. This deed is not fraudulent within the statute of Elizabeth. The rule at common law, independently

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of the bankruptcy laws, was that a debtor might prefer any of his creditors to the exclusion of the others. There is no question here of the bankruptcy laws. The statute of Elizabeth was aimed at preventing conveyances by which the debtor colourably conveyed away his property, so as to defeat his creditors and retain for himself the enjoyment of the property that ought to have been applicable to his debts. This is a deed for the benefit of the debtor's creditors, or at least for such of them as choose to take advantage of it. It is quite a novel contention to suggest that a deed may be void under the statute of Elizabeth, because it is against the policy of the bankruptcy laws. The point most strongly against the plaintiffs is the provision that the dividends of creditors who do not come in shall be repaid to the debtor, but after all, this places the creditor in a position no more unfavourable than he always was in at the common law. The creditor, when any such sum is in existence, may obtain the fruits of his judgment against it in the hands of the trustees by attachment. [He cited *Siggers* v. *Evans* (1); *Twyne's Case.* (2)]

R. T. Reid, for the defendants. The deed is fraudulent under the statute of Elizabeth, because its effect is to delay, hinder, and defraud creditors. The debtor seeks to obtain by it protection for his property under a scheme framed in his interests, and no creditor can come in without incurring the responsibility of indemnifying the trustees. A certain class of creditors, viz. those whose debts are under 50*l.*, and who cannot take bankruptcy proceedings, are without any remedy if they do not choose to come in and incur this responsibility. The deed is precisely within the principles on which deeds have always been held fraudulent under the statute of Elizabeth, because it contains a resulting trust for the benefit of the debtor, if the creditor will not come in. Even supposing that there is, as suggested, a remedy against such sum of money as may be payable to the debtor by attachment, the creditor who does not come in is delayed for a year. [He cited *Freeman* v. *Pope* (3); *Ex parte Saffery* (4); *Ex parte Jones.* (5)]

Crompton, in reply.

(1) 5 E. & B. 367; 24 L. J. (Q.B.) 305.
(2) 1 Sm. L. C. 1.
(3) Law Rep. 5 Ch. 538.
(4) 4 Ch. D. 555.
(5) Law Rep. 10 Ch. 663.

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MELLOR, J. I am of opinion that our judgment should be for the defendants. I think this deed was invalid by reason of the provisions of 13 Eliz. c. 5. Its object plainly was to prevent the creditors from exercising their ordinary remedies in respect of the sums due to them, and to compel them to come in under the scheme of arrangement prescribed by the debtor. By this scheme the trustees may carry on the business if they think fit, and the creditors, in order to get their dividends, must enter into obligations not required of them in the ordinary course of law, for the executing or assenting creditors are to indemnify the trustees against personal risk and loss. If any creditor refuses to come in, there is a resulting trust in favour of the debtor, in respect of the dividend that would otherwise have been due to such creditor. It seems to me quite clear that the effect is to defeat and delay creditors whose debts are under 50*l.* Creditors to a greater amount might treat this deed as an act of bankruptcy, but those whose debts are under 50*l.* are without remedy if the deed be good. It is admitted that the deed was executed for the purpose of defeating any execution, including that of the defendants, which was then apprehended, and for the purposes stated in the deed itself. We are of opinion that those purposes are contrary to law, for the reasons above mentioned, and therefore that the deed cannot be sustained against the execution creditors.

MANISTY, J. I am of the same opinion. The question is whether this deed is good with reference to the provisions of the statute 13 Eliz. c. 5. That depends on whether or not its object was to defeat, delay, or hinder creditors. It is stated in the special case that the execution of the deed was for the purpose of defeating any execution, including that of the defendants, which might prevent an equal distribution of the debtor's property among all his creditors, and also for the purposes stated in the deed itself. What, then, are the purposes stated in the deed? One of the provisions is that the trustees may carry on the business if they think fit, irrespective of the wishes of the creditors, and any creditor, before getting a dividend, must consent to indemnify the trustees in respect of personal loss and risk. The creditors are not only subjected to serious delay. The trustees

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may carry on the business and incur debts, and the creditors may suffer. If they come in and assent to the deed, they must indemnify the trustees, and if they do not, they get no dividend, the dividend apportioned to them being handed over to the debtor. This is, at any rate primâ facie, a resulting trust in favour of the debtor, but the plaintiffs' counsel says that the dissenting creditor might get execution against any such fund in the hands of the trustees, by way of attachment of it as a debt due to the debtor. That is a very remote and doubtful remedy under the circumstances. The deed, in my opinion, tends to defeat, or at least delay, the creditors. It provides that unless the creditor claims his share of the proceeds of the estate in the hands of the trustees upon terms which no prudent man, in my opinion, would come under, that share shall go to the debtor, and the creditor, after a long delay, is left to the shadowy remedy to which I have alluded. The deed seems to me, therefore, to be clearly void under the statute as containing a resulting trust in favour of the debtor, and tending at least to delay creditors.

Judgment for the defendants.

Solicitors for plaintiffs: *Field & Roscoe.*
Solicitor for defendants: *Charles Butcher.*

Dec. 3.

THE LEICESTER WATERWORKS COMPANY *v.* THE ASSESSMEN COMMITTEE OF THE BARROW-ON-SOAR UNION AND WILLIAM NUTTALL AND JOHN SHEFFIELD.

Poor Law—Assessment Committee cannot be sued—Rating Appeal—Reference to Arbitration—Costs of Reference and Award—25 & 26 *Vict. c.* 103, *s.* 20.

An assessment committee being respondents in an appeal against a poor-rate, an agreement was entered into which was expressed to be made between the appellants and the assessment committee for and on behalf of the guardians, and by which the rateable value of the subject-matter of the rate was referred to arbitration, the costs of the reference and award to be in the discretion of the arbitrators. The award was in favour of the appellants, and directed the "other party" to pay the appellants' costs of the reference and the costs of the award:—

Held, that an action would not lie against the assessment committee to recover these costs.

SPECIAL CASE, the facts of which were, in substance, as follows:—

In 1871 and 1872 certain appeals had been brought and were

pending against rates made upon the plaintiffs' works in and passing through the several parishes in the Barrow-on-Soar Union. The guardians of the said union duly gave their consent to the assessment committee to appear and defend such appeals, and thereupon the assessment committee for the year 1872, in pursuance of 27 & 28 Vict. c. 39, s. 2, did appear in the name of the guardians as respondents to such appeals. The defendants Nuttall and Sheffield were respectively chairman and vice-chairman of the assessment committee for 1872. While the appeals were pending a memorandum was made and signed by the chairman of the plaintiffs' company and Mr. Nuttall, the chairman of the assessment committee, stating that, at a meeting of the committee of directors of the plaintiffs' company and the assessment committee, it was agreed that all questions, in relation to the rating of the waterworks company's works comprised in and passing through the several parishes of the union, should be submitted to Mr. Thomas Hawkesley on the part of the waterworks company, and to Mr. Corbet on behalf of the said guardians, with a view to their adjusting the same, and, in case of their failing to do so, with power to appoint an umpire whose decision should be final, and it was agreed that pending this reference the appeals should be respited. The arrangement was to be subject to confirmation by the board of directors of the waterworks company. The arrangement was confirmed by the waterworks company, and an agreement of submission was drawn up and was, with the consent of the guardians of the Barrow-on-Soar Union, signed for and on behalf of the assessment committee by Mr. Nuttall as chairman of the committee.

This agreement was expressed to be made between the plaintiffs of the one part, and the assessment committee of the Barrow-on-Soar Union, for and on behalf of the board of guardians of such union, of the other part. It referred the matters in dispute to the two gentlemen above mentioned or their umpire, and provided that the costs of the reference and award should be in the discretion of the arbitrators or their umpire. It was signed by the chairman and deputy-chairman of the plaintiffs' company for and on behalf of the company, and by Mr. Nuttall for and on behalf of the assessment committee.

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No judge's order or order of sessions was applied for or obtained by either party ordering or authorizing the reference.

The arbitrators having disagreed, the umpire duly made and published his award on the 31st of January, 1874. The effect of it was that the rateable value of the plaintiffs' works should be reduced, and that the appellants' costs of the reference and award should be paid by "the other party to the said reference." The award was taken up by the plaintiffs, and had been acted upon by both parties. The terms of it had been carried out so far as related to the altering of the valuations, and it was taken as the basis of settlement of the rateable value by the quarter sessions at the hearing of the appeals. The assessment committee in all their proceedings with reference to the rates, appeal, and arbitration were acting by and with the consent and approval of the guardians. Various applications were made for the payment of these costs to the clerk to the assessment committee, but they had not been paid. (1)

The question for the Court was, whether under the above circumstances the defendants on the record, or some or one of them, were liable to repay to the plaintiffs the amount paid on taking up the award and the plaintiffs' taxed costs of the reference.

Merewether, Q.C. (*Sills* with him), for the plaintiffs, contended that the action was maintainable against the assessment committee; that the provisions of the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), gave them a quasi-corporate capacity; and that ss. 20 and 26 of the Act enabled them to enter into the agreement of reference so as to bind them quâ committee; and that if the assessment committee were not liable, the other defendants were liable in their personal capacity. They cited 27 & 28 Vict. c. 39, s. 3.

Marshall Griffith, Q.C., Pitt Lewis, and *Glen,* for the several defendants, contended respectively that the assessment committee

(1) It seemed, from various expressions in the correspondence set out in the case, that a difficulty had arisen as to the legality of the application of the union funds to the payment of the costs, the time having elapsed within which payment might legally be made by the guardians without an extension of time by the Local Government Board, and no such extension of time having been applied for by the defendants or granted.

could not be sued as a corporate body, being a mere committee acting as agents of the guardians; that the other defendants were not personally liable; and that the guardians of the union were the parties really liable on the agreement.

MELLOR, J. I am of opinion that our judgment must be for the defendants. The plaintiffs are a water company having works in the Barrow-on-Soar Union, and in 1871 and the following year disputes arose between the company and the authorities of the union, as to the rateable value of the company's works in the union. Certain appeals were accordingly brought against the rates in respect of those works, and by consent of the guardians the assessment committee appeared in the name of the guardians as respondents in these appeals. During the pendency of these appeals a meeting took place between the chairman and one or two other gentlemen, as representing the company, and the assessment committee as representing the guardians, and it was, as it seems to me very wisely, agreed that the rateable value of the property in question should be settled out of court. On the 29th of June, 1872, an agreement was entered into between the company and the assessment committee on behalf of the guardians, such agreement being signed by the chairman of the company and by the defendant, William Nuttall, as chairman for and on behalf of the assessment committee. By that agreement it was agreed that the matters in question should be referred to two arbitrators, and their umpire, and that the costs incidental to the reference should be in the discretion of the arbitrators, or the umpire, as the case might be. The reference was held, and the award duly made and published. The award was in favour of the company, and the expenses were ordered to be paid by the opposite party, that is, the assessment committee or the guardians. In that state of things, and the expenses of the reference which were so ordered to be paid having been ascertained, this action is brought to recover such expenses against the assessment committee and Messrs. Nuttall and Sheffield, who were respectively chairman and vice-chairman of the committee, and the question, therefore, we now have to decide is whether it will lie against either of the defendants.

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I have come to the conclusion that it will not. Now, in the first place, what is the position of an assessment committee, and what are the functions which they have to discharge? The Act 25 & 26 Vict. c. 103, s. 2, provides that they are to be annually chosen out of the body of the guardians, for the purpose of investigating and supervising the valuations made of the rateable property within the union. They are a committee selected out of the body of the guardians for the purpose of more conveniently dealing with the particular subject of valuation of rateable property in the union, and matters incidental thereto. The counsel for the plaintiffs relied on the words of the 20th section which enables a committee, with the consent of the guardians, to employ a person to survey and value the rateable hereditaments comprised in a valuation list; but this power seems only to be given for the purpose of enabling the assessment committee or guardians to procure a valuation by a valuer where questions arise as to the correctness of the list, and was never intended to empower the assessment committee or the guardians to refer the valuation of the particular hereditament in the case of an appeal to arbitration. The parties might have had recourse to the provisions of 12 & 13 Vict. c. 45, and then, under the authority of a judge's order, proper machinery might have been provided for an effective arbitration, but I think that the assessment committee had no power under 25 & 26 Vict. c. 103, to incur these expenses. I cannot see how an assessment committee as such can be held liable for an act done by them as assessment committee, and on behalf of the guardians of the union. They are not a corporation, but merely a select committee or body of guardians charged with the performance of certain statutory duties. They have no funds of their own. The funds of the union—which are administered by the whole body of the guardians—are the only funds out of which their expenses are met. Again, are they liable in their personal capacity? There seems to be no ground for suggesting that they are so liable. Whether the guardians might have been liable, if they had been sued, is a question which we are not now called upon to determine, but I fail to see how the assessment committee as a body, or any individual member of that body, can be liable. They are merely a committee exercising certain statu-

tory functions on behalf of the guardians, the whole body of whom have the administration of the funds of the union. Unfortunately, for there is no doubt that the agreement was a very wise one, and one the provisions of which ought to have been carried out, by accident apparently, the statutory period during which alone, by 22 & 23 Vict. c. 49, this claim could be brought against the guardians, seems to have been allowed to pass away. The 4th section of the Act allows, it is true, a settlement to be made by the guardians in certain cases, notwithstanding the lapse of the period of limitation, but this section was intended to obviate the obvious injustice that might otherwise be inflicted on a claimant who had duly taken proceedings when the time had been exceeded during the litigation, or from other causes beyond his control. I confess I feel very sorry, the money being clearly due, and everything having been perfectly bonâ fide on all sides, that I am compelled to come to this conclusion.

MANISTY, J. I agree. This is not an action by persons employed to value by the assessment committee. No question as between employer and employed arises, and the cases that have been referred to, which turn upon that relation, have no analogy to the present. It is an action between the parties to a certain agreement of reference to recover the costs of the reference, i.e. the charges of the arbitrators and umpire, and the costs of the successful party. The question is, who were the parties to the agreement? The chairman of the plaintiffs' company is not, in my opinion, a party to it in his personal capacity; nor is Mr. Nuttall, who represented the assessment committee. In my opinion the parties are the water company and the board of guardians. This pretty nearly disposes of the whole case. It was suggested that we were only to look to the signatures. I think that we have to look at the whole agreement to see who were intended to be the parties to it. It is expressed to be made between the company of the one part, and the assessment committee for and on behalf of the guardians of the other. The umpire decided that the costs were to be paid by the "other party." The guardians of the union are the other party, as it seems to me. It follows, therefore, that none of these defendants

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are liable. An assessment committee cannot be sued. They are not a corporation, and I do not understand on what principle they are to be made liable. If the question had been whether, under these special circumstances, the expenses could have been recovered from the guardians, I should perhaps have wished to take time to consider, but that point does not arise. I think the provisions of the 20th section of 25 & 26 Vict. c. 103, amplified the power given to an assessment committee on questions relating to valuations, but conferred no power on them to refer a matter to arbitration. In my judgment that could only have been done under 12 & 13 Vict. c. 45. As the question as to the period of limitation affecting payments by guardians does not arise, I forbear to discuss it.

Judgment for the defendants.

Solicitors for plaintiffs: *Paterson, Snow, & Bloxam, for Haxby.*
Solicitor for defendants: *Mander.*

Dec. 4.

ROSSITER, APPELLANT; PIKE, RESPONDENT.

Salmon Fishery Act, 1861 (24 & 25 *Vict. c.* 109), *s.* 20—*Fishing Mill Dam—Abandonment of Fishery.*

Where a dam had been used as a fishing mill-dam up to a date subsequent to the passing of the Salmon Fishery Act, 1861, but the use of it for fishing purposes was then abandoned and all appliances for fishing removed:—

Held, that the dam had ceased to be a "fishing mill-dam" within the statute, and had become an ordinary mill-dam, and that consequently the 20th section of the Salmon Fishery Act, 1861, did not apply, and the occupier of the dam was not bound to remove obstructions to the free passage of fish as required by the section.

CASE stated by justices under 20 & 21 Vict. c. 63.

At the Totnes Petty Sessions, on the 8th October, 1877, an information was preferred by the respondent against the appellant, charging the appellant for that on the 5th of September, 1877, he being the occupier of fisheries at the Totnes weir and the fulling mills in the parish of Totnes, in the county of Devon, did not within thirty-six hours after the commencement of the close season for the river Dart, cause to be moved and carried away from the

waters within his fisheries all obstructions to the free passage of fish in or through his cruives, cribs, and boxes within his fisheries, contrary to s. 20 of the Salmon Fishery Act, 1861.

The justices convicted the appellant, and adjudged him to forfeit all obstructions to the fisheries and to pay a fine of 10*s*., and also 10*s*. for every day he suffered any engines or other obstructions to the free passage of fish to remain unremoved beyond the period prescribed by the Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109, s. 20).

It appeared from the case that there was a dam or weir across the Dart in connection with appellant's mill, at one side of which was a sluice with fenders. The dam turned the water of the river into the mill leat for milling purposes. The fenders were at the upper end of what had once been a fishing box by the side of the dam. When lowered they shut off the water from the fishing box, but when they were raised the water passed through the sluice into the box, and thence into the main river. There had been at one time gratings behind the fenders to prevent the passage of fish upwards, and at the other end of the fishing box had been gates or gratings, which closed so as to prevent the fish which found their way up through an opening in such gates into the box from getting back into the river. It appeared that at the time, to which the information related, the gates at the lower end of the fishing box and the gratings behind the fenders had been removed, but that the keeping the fenders down would prevent fish from ascending to the higher waters of the river, and that they were kept down at divers times during the close time so as to prevent the fish ascending. In its existing state the box could not be used for fishing purposes, as the appliances for fishing were removed, but the gates and gratings might be replaced, and then the box might be again used for fishing purposes. It appeared that the gratings and gates had been removed about sixteen years previously to the hearing of the case, which would be subsequent to the passing of the Salmon Fisheries Act, 1861, and that the box had been used as a fishing box up to 1862. It further appeared that the fenders were a part of the apparatus of the mill, and if the fenders were taken away the mill would be of little value, and that the mill would be ruinously affected by lifting the fenders

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during the whole of the annual close time and partially in the weekly close time.

The question asked of the Court was, whether all obstructions to the free passage of fish in and through the cruives, cribs, and boxes, &c., within the fisheries at Totnes weir and the fulling mill in the parish of Totnes had been removed and carried away from the waters within the fisheries within thirty-six hours after the commencement of the close season for the River Dart, in accordance with the provisions of the Salmon Fishery Act, 1861, and whether the justices were correct in convicting the appellant as aforesaid.

Russell, Q.C. (*Pitt Lewis* with him), for the appellant. The appliances for fishing having been removed, the dam had ceased to be a fishing mill-dam, and there being no fishery, the provisions of 24 & 25 Vict. c. 109, s. 20, did not apply to the appellant: *Pike* v. *Rossiter*. (1)

[They also cited *Hodgson* v. *Little* (2); *Garnet* v. *Backhouse*. (3)]

James Paterson (*Bompas, Q.C.*, with him), for the respondent.

[MELLOR, J. The only point that appears to be left open to you by the decision of this Court in *Pike* v. *Rossiter* (1) is, that in the present case the use of the dam for fishing purposes is shewn to have been continued till a date subsequent to the passing of the Salmon Fishery Act, 1861.]

It is contended that that distinguishes the present case from the former one. The Act distinguishes between fishing mill-dams and ordinary mill-dams. If a dam was a fishing mill-dam when the Act passed, the occupier cannot by altering the structure and using it as an ordinary mill-dam get rid of the obligations imposed upon him by the Act. The Act was passed for the public good and the benefit of the salmon fisheries, and it was intended that wherever there was a fishery at the time of the Act coming into force, certain facilities should be given for the passage of the fish. The fact that the party formerly occupying a fishery has chosen to abandon the fishery, cannot be a reason for allowing him to

(1) 37 L. T. (N.S.) 635.
(2) 14 C. B. (N.S.) 111; 32 L. J. (M.C.) 220; 16 C. B. (N.S.) 198; 33 L. J. (M.C.) 229.
(3) Law Rep. 3 Q. B. 30.

stop the upward passage of fish altogether. The words "used or intended to be used" in the definition of a fishing mill-dam in the 4th section of the statute have reference to the time of the passing of the Act. *Hodgson* v. *Little* (1) is an authority in the respondent's favour.

[MELLOR, J. As I read that case, there was no bonâ fide abandonment of the fishery there.]

MELLOR, J. I am prepared to abide by the decision of this Court in the former case, the facts of which are on all fours with those of the present, with one exception. In the former case the alteration of the mill-dam, which undoubtedly at one time was a fishing mill-dam, was taken to have been before the passing of the Act of 1861, whereas here there is evidence that the dam was used subsequently to the Act for fishing purposes. The only question that is now open in this Court is whether, where there is since the Act a total abandonment of the fishery by taking away all the apparatus which renders the use of the dam for fishing purposes possible, the character of a fishing mill-dam still remains impressed upon it; in other words, whether once a fishing mill-dam since the Act always a fishing mill-dam. I can find nothing in the Act which expressly or by implication obliges me to come to this conclusion. It seems to me that such a construction of the Act would lead to great inconvenience, and though the improvement of the salmon fisheries is no doubt a very desirable object, I cannot suppose that it was intended to enact that every dam that was used as a fishing mill-dam at the date of the Act must necessarily continue a fishing mill-dam for all time. It would be going to a great length to hold that this was the intention of the Act, when we find that if the appellant in this case were subject to the obligations incident to a fishing mill-dam, it would be ruinous to his business as a miller. Under the circumstances he set a higher value on his business as a miller than the fishery, and removed all the appliances for catching fish, and for sixteen years has abandoned the use of the mill-dam for fishing purposes. I think, under these circumstances, there is nothing to prevent the dam

(1) 14 C. B. (N.S.) 111; 32 L. J. (M.C.) 220; 16 C. B. (N.S.) 198; 33 L. J. (M.C.) 229.

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from ceasing to be a fishing mill-dam. I feel the more fortified in this view because I do not see that any great public inconvenience can follow; for if there is an obstruction to the upward progress of the fish, on a proper representation to the Secretary of State any party interested can get a licence to affix a fish-pass to the weir under the 23rd section. In that case the owner of the dam will be entitled to compensation if he suffers any damage. It seems to me that in this case there was on the part of the appellant a bonâ fide abandonment of the fishery, as evidenced by the length of time during which the use of the dam as a fishing mill-dam had been discontinued, and that the dam had therefore become a mill-dam simpliciter, and not a fishing mill-dam, and consequently the appellant is not subject to the obligations which it is sought to impose upon him.

MANISTY, J. I agree. In the former case of *Pike* v. *Rossiter* (1) this Court held that, where a dam had, up to a short time before the passing of the Act of 1861, been so constructed as to be capable of use, and had been used partly for fishing purposes, but before the Act had ceased to be so used, and had been altered so as not to be capable of being used for fishing purposes, it ceased to be a fishing mill-dam within the meaning of the Act. The only point now open to the respondent to argue is, whether the fact, that the dam is now shewn to have been used for fishing purposes since the Act, makes any difference. It is urged that, it having once been used since the Act as a fishing mill-dam, it is not open to the proprietor to escape from the obligations incident to a fishing mill-dam by using it as a mill-dam simpliciter. It does not appear to me that the provisions of the Act support this contention. Suppose a dam that was formerly a mere mill-dam and not a fishing mill-dam to be used for a year for fishing purposes. Why should not the owner be at liberty to revert to the former state of things, to cease to use it as a fishing mill-dam, and to use it as before, as a mere mill-dam? When the dam ceases to be used for fishing purposes, it will, as it seems to me, be a mill-dam within the meaning of s. 23, and if it is an obstacle to the passage of the fish, by taking the proper steps a fish-pass may be affixed to it. It

(1) 37 L. T. (N.S.) 635.

seems to me reasonable that, if the occupier chooses to give up the fishing and use the dam for milling purposes only, he should be at liberty to do so, and then, if any person interested in the fishery thinks it desirable, he can apply for a licence to erect a fish pass, and must compensate the occupier of the mill-dam for any damage done.

Conviction quashed.

Solicitors for appellant: *Makinson & Carpenter.*

Solicitors for respondent: *Parkers, for Hooper & Michelmore.*

IN THE MATTER OF THE UNITED PATRIOTS' NATIONAL BENEFIT SOCIETY AND ALFRED HOLT. *Dec. 9.*

Friendly Society—Friendly Societies Act, 1875 (38 & 39 *Vict. c.* 60), *ss.* 22, 30—*Arbitration, Rule for Settlement of Disputes by—Court of Summary Jurisdiction.*

The provisions of sect. 30 of 38 & 39 Vict. c. 60, apply to all friendly societies, not only to friendly societies receiving contributions by means of collectors at a greater distance than ten miles from the registered office of the society. Consequently, though the rules of a friendly society provide for the settlement of disputes between the society and members by arbitration, a Court of summary jurisdiction has jurisdiction under 38 & 39 Vict. c. 60, s. 30, to decide such disputes.

MOTION by way of appeal against the decision of Field, J., at chambers, refusing a writ of prohibition to restrain further proceedings upon an order made by a stipendiary magistrate at Birmingham, under the following circumstances:—

Alfred Holt made a claim on a friendly society called the United Patriots' National Benefit Society, as the representative of Thomas Holt, a deceased member of the society, for a sum of 14*l.*, as funeral allowance, and the society resisting the claim, the claimant applied to the magistrate under sect. 30, sub-s. 10, of 38 & 39 Vict. c. 60, for an order for payment of the amount claimed. The society's rules contained a provision that all disputes between the society and any member or person claiming through a member should be decided by arbitration in a particular manner therein specified. The society was not a society receiving contributions by means of collectors. The magistrate made an order for payment of the sum claimed to the claimant, and there-

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upon the society made the above-mentioned application to Field, J., at chambers (1).

Charles, Q.C., and *Austin*, moved to vary the order of Field, J. They contended that the 30th section of 38 & 39 Vict. c. 60, only applied to friendly societies receiving contributions by means of collectors at a distance of more than ten miles from the registered office of the society, and to industrial assurance companies receiving contributions in like manner; that it could not have been intended to deprive friendly societies generally of the benefit of rules providing that the only mode of settling disputes should be by arbitration; that the words "receiving contributions," &c. must be read as applying to friendly societies as well as industrial assurance companies; and that consequently sect. 22 of 38 & 39 Vict. c. 60, applied, and as the rules provided that disputes should be decided by arbitration, the magistrate had no jurisdiction.

Wood Hill shewed cause. He contended that the words "receiving contributions," &c. in sect. 30 only applied to industrial assurance companies, and that the section applied to all friendly societies, and that consequently, notwithstanding the provisions of sect. 22 of 38 & 39 Vict. c. 60, the magistrate had jurisdiction to make the order.

MELLOR, J. On the whole I come to the conclusion, though not without some difficulty, that the decision of Mr. Justice Field

(1) 38 & 39 Vict. c. 60, s. 22, provides that every dispute between a member of a society or person claiming through a member, or under the rules of a registered society, and the society shall be decided in the manner directed by the rules of the society.

Sect. 30 provides as follows :—"The provisions of the present section apply only to friendly societies and, except as after-mentioned, to industrial assurance companies receiving contributions by means of collectors at a greater distance than ten miles from the registered office of the society."

Sub-section 10 of the same section provides as follows:—"In all disputes between a society and any member or person insured, or any person claiming through a member or person insured, or under the rules, such member or person may, notwithstanding any provisions of the rules of such society to the contrary, apply to the county court or to the court of summary jurisdiction for the place where such members and other persons reside, and such court may settle such dispute in the manner herein provided."

at chambers was right, and should be affirmed. The sections are, no doubt, somewhat confused and perplexing, but I cannot see that there is any reason why the provisions of sect. 30, sub-sect. 10, should apply only to friendly societies receiving contributions by means of collectors at a greater distance than ten miles from their registered office. It seems to me that the natural construction of the 30th section is, that the provisions of it should apply to all friendly societies and to some industrial assurance societies, viz. those receiving contributions by means of collectors at a greater distance than ten miles from the registered office. The application must therefore be refused.

MANISTY, J. I am of the same opinion. There is no doubt that sect. 30, sub-sect. 10, must to some extent qualify the provisions of sect. 22 with reference to the settlement of disputes. The only question is to what extent such qualification goes. Reading the section according to the most natural grammatical construction of the words, what is the meaning of it?

It seems to me that the collocation of words adopted is not that which a draughtsman would naturally have adopted, if he had wished to draw an enactment effecting that which the society contends is the effect of the section. It seems to me that if a draughtsman had wished to draw such an enactment he would have worded it somewhat after this fashion—he would have said that the section should apply to all friendly societies receiving contributions by means of collectors at a greater distance than ten miles from the registered office of the society, and, except as aftermentioned, to all industrial assurance companies receiving contributions in like manner. I feel confirmed in the view I take of the construction of sect. 30, by reference to the 4th section, in which industrial insurance companies are spoken of as receiving premiums or contributions by means of collectors, whereas there is no reference to friendly societies in similar terms.

Motion refused.

Solicitor for the Benefit Society: *King.*
Solicitor for the Claimant: *James Neal.*

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Dec. 20.

MOYCE *v.* NEWINGTON.

Sale of Goods—Fraud, Contract induced by—Passing of Property—Conviction for False Pretences, Effect of, under 24 & 25 *Vict. c.* 96, *s.* 100—*On Conviction "the property shall be restored."*

46 BD 460
5 Asp Cas 667, 677

By 24 & 25 Vict. c. 96, s. 100, if any person guilty (inter alia) of obtaining any chattel, money, or other property by false pretences "shall be indicted on behalf of the owner of the property and convicted, in such case the property shall be restored to the owner."

W. purchased and obtained delivery of certain sheep from the defendant by false pretences. The plaintiff purchased the sheep from W. and paid W. for them without knowledge of the fraud, the defendant having done nothing in the meantime to avoid the contract between himself and W. The defendant finding that the sheep were on the plaintiff's premises retook possession of them; W. having been convicted of obtaining the sheep by false pretences on the prosecution of the defendant:—

Held, that the effect of 24 & 25 Vict. c. 96, s. 100, was not to revest the property in the sheep in the defendant as against the plaintiff, who had acquired a good title to them before the conviction, and consequently that the defendant was liable in an action by the plaintiff for the value of the sheep.

THIS was an action for the conversion of certain sheep, tried before the Lord Chief Justice at the last Maidstone assizes.

The facts sufficiently appear from the judgments.

At the trial the verdict was entered for the plaintiff, but the Lord Chief Justice did not enter the judgment for either party.

Nov. 7. *Willoughby* and *Shiress Will*, for the plaintiff, moved for judgment. It is clear that, apart from the statute 24 & 25 Vict. c. 96, s. 100, the plaintiff is entitled to judgment. The sale by the defendant to Wale being procured by fraud was voidable by the defendant but not void, and the plaintiff having purchased the sheep bonâ fide before the defendant did any act to avoid the sale, his title to the sheep holds good: Benjamin on Sales, 342; *Stevenson* v. *Newnham* (1); *White* v. *Garden* (2); *Powell* v. *Hoyland* (3); *Load* v. *Green*. (4) The question, therefore, is whether the statute makes any difference. The case of *Lindsay* v. *Cundy* (5) is an authority to the contrary. The

(1) 13 C. B. 285.
(2) 10 C. B. 919.
(3) 6 Ex. 67.
(4) 15 M. & W. 216.
(5) 1 Q. B. D. 348.

judgment of this division was overruled in the Court of Appeal (1), but on a different point. The statute does not say that the "property" shall "revest," using the term "property" to denote the right of the owner, but it says that the "property," meaning thereby the thing itself, shall be "restored." The meaning is that when the property is found in the possession of the criminal, and is in the hands of the police, it shall be given back to the prosecutor, and the section goes on to say that the Court may award a writ of restitution or order the restitution thereof in a summary manner. It never was intended that an intermediate good title that had been obtained by an innocent purchaser should be divested. [They also cited *Horwood* v. *Smith* (2); *Kingsford* v. *Merry* (3); *Parker* v. *Patrick*. (4)]

Grantham, Q.C., and *Arbuthnot*, for the defendant, shewed cause. There was not prior to 7 & 8 Geo. 4, c. 29, s. 57, of which 24 & 25 Vict. c. 96, s. 100, is substantially a re-enactment, any provision for restitution in case of false pretences. It is submitted that the intention of these enactments was to put the case of property obtained by false pretences on the same footing as that obtained by larceny. *Lindsay* v. *Cundy* (5) was not a similar case to the present. There the original owner of the goods, from whom they had been obtained by fraud, sued bonâ fide purchasers who had before the conviction parted with the goods. It was held that the title which the original owner of the property acquired under the statute did not relate back, so as to give him a right of action against the defendants who had parted with the goods while they had a good title. *Scattergood* v. *Sylvester* (6), and *Nickling* v. *Heaps* (7), are authorities in the defendant's favour. [They also cited *Reg.* v. *Stancliffe* (8); *Fowler* v. *Hollins* (9); *Peer* v. *Humphrey*. (10)]

Willoughby, in reply, referred to *Cundy* v. *Lindsay* (11).

Cur. adv. vult.

(1) 2 Q. B. D. 96.
(2) 2 T. R. 750.
(3) 1 H. & N. 503; 26 L. J. (Ex.) 83.
(4) 5 T. R. 175.
(5) 1 Q. B. D. 348; 2 Q. B. D. 96.
(6) 15 Q. B. 506; 19 L. J. (Q.B.) 441.
(7) 21 L. T. (N.S.) 754.
(8) 11 Cox, C. C. 318.
(9) Law Rep. 7 H. L. 757.
(10) 2 A. & E. 495, 499.
(11) 3 App. Cas. 459.

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Dec. 20. The judgment of the Court (Cockburn, C.J., Mellor and Field, JJ.) was delivered by

COCKBURN, C.J. This was a case tried before me at the last assizes for the county of Kent, and in which the action had been brought by the plaintiff to recover a lot of forty-nine sheep under the following circumstances. On the 30th of October, 1877, the plaintiff, who is a butcher, and who is in the habit of attending cattle and sheep markets, being at Maidstone market, bought of a man named Wale, through a salesman of the market, this flock of forty-nine sheep. The purchase was made in the open market, the price was a fair one, and was paid. The transaction was a regular one, and no blame attached to the plaintiff in respect of it. It turned out, however, that the sheep had been obtained from the defendant, who is a farmer, by Wale, under colour of a purchase, but in reality by false pretences. Professing to buy the sheep at the price of 48*s.* a head, Wale gave in payment a cheque on a bank at which he had no funds and kept no account. The cheque was of course dishonoured. A warrant was taken out against Wale by the defendant on the 25th of October, and he was afterwards convicted of having obtained the sheep by false pretences, and it must be taken for the present purpose that they were so obtained.

It is to be observed that, though the sale from Wale to the plaintiff took place in open market, it was admitted before us that the market, having been recently established by the corporation of Maidstone under a local Act, was not one in respect of which the protection arising from a sale in market overt would attach. The sheep were taken to the plaintiff's premises at Seale, which is some distance from Maidstone, and arrived there on the 31st, the ensuing day. On the 7th of November the defendant, having in the meantime set the police to work, and having learned what had become of the sheep, went with a police-officer to the plaintiff's premises, and there took possession of the sheep, which were afterwards removed to his own farm. On the 7th of November Wale was convicted of obtaining the sheep by false pretences. The sheep being already in the defendant's possession no order of restitution was asked for. The question, under the circumstances,

is which of the two, the plaintiff or defendant, is entitled to the sheep.

Although, if the matter rested on abstract principle, it might be open to be contended that, inasmuch as, to make a valid contract, both parties must intend to be bound by it, consequently, when in an apparent contract of sale the buyer intends to get the goods, but not to pay for them, but to defraud the seller, the contract fails to take effect, and though the seller intended the property to pass, yet that, the contract failing to take effect, the property still remains unaltered, yet the question is now so concluded by authority as to be no longer open to discussion. We must now take it to be settled—it is unnecessary to go through the cases, which are set out in Mr. Benjamin's work—that though a seller is induced to sell by the fraud of the buyer, and though it is competent to the seller by reason of such fraud to avoid the contract, yet, till he does some act to avoid it, the property remains in the buyer, and that, if he in the meantime has parted with the thing sold to an innocent purchaser, the title of the latter cannot be defeated by the original seller. The reasoning on which this conclusion is based may not appear altogether consistent with principle, and agreeing in the result we should prefer to adopt the view of the American courts, as stated in the case of *Root* v. *French* (1), a case decided in the Supreme Court of Judicature of the State of New York, according to which the preference thus given to the right of the innocent purchaser is treated as an exception to the general law, and is rested on the principle of equity that where one of two innocent parties must suffer from the fraud of a third, the loss should fall on him who enabled such third party to commit the fraud. But on whatever ground it may be said to rest, the law must be taken to be now definitively settled.

The question which in some cases might be a very material one, as well as one of some nicety, viz. what, on the part of the defrauded seller, short of retaking possession of the thing sold, will amount to an avoidance of the contract, does not arise in the present instance. The defendant not knowing what had become of his sheep, or where to find Wale, his buyer, had done and could

(1) 13 Wendell, 570.

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do nothing, beyond giving notice to the police, up to the time when the sheep were bought by the plaintiff.

We must take it, therefore, as incontestible, that but for the subsequent conviction of Wale for having obtained these sheep by false pretences, no question could be raised as to the title of the plaintiff. But it is contended that by reason of such conviction the defendant is entitled to the benefit of the provision of 24 & 25 Vict. c. 96, s. 100, which enacts that where property has been obtained (inter alia) by false pretences, on conviction of the party so obtaining it, restitution shall be made to the party from whom it has been so obtained. But we are clearly of opinion that this enactment, which is in these terms,—"If any person guilty of any felony or misdemeanour, in stealing, taking, obtaining, extorting, embezzling, converting or disposing of, or in knowingly receiving any chattel, money, valuable security or other property whatsoever, shall be indicted for such offence by or on behalf of the owner of the property or his executor, or administrator, and convicted thereof, in such case the property shall be restored to the owner"—has no application to such a case as the present. The language applies, and is obviously intended to apply, to cases, and to these only, in which possession has been obtained without the property passing. This was the construction put on the statute by this Court in *Lindsay* v. *Cundy* (1); and though the view there taken by the Court on the primary question, as to whether a contract had been made by the sellers with the person obtaining the goods, was reversed on appeal; the second ground of the judgment, which is the one immediately applicable to the present case, remains unshaken, and we have no hesitation in adhering to it. And it is strongly confirmed by the case of *Horwood* v. *Smith* (2), which was a case of sheep stolen and sold by the thief in market overt, and in which the thief was convicted of the larceny; yet it was held that, as the conviction did not take place till after the sale, the owner was not entitled to restitution under 21 Hen. 8, c. 11. In the present case, as in the foregoing, there was no property in the prosecutor at the time of the conviction. It had been parted with by a contract, which, though under the circumstances voidable, ceased on the sale

(1) 1 Q. B. D. 348. (2) 2 T. R. 750.

before it had been avoided to be any longer voidable; and as to which, therefore, the right of the plaintiff had become indefeasible. It cannot have been the intention of the statute to defeat it nevertheless, and by the mere conviction of the fraudulent purchaser to deprive the innocent buyer of the right which, according to the decisions in the series of cases already referred to, had become absolute in him.

Our judgment must therefore be for the plaintiff.

Judgment for the plaintiff.

Solicitor for plaintiff: *Knocker.*

Solicitor for defendant: *Langham.*

THE GUARDIANS OF THE BARTON REGIS UNION, APPELLANTS; THE CLERK OF THE PEACE OF THE COUNTY OF BERKS, RESPONDENT. *Dec.* 11.

Poor Law—Lunatic—Prisoner acquitted on Ground of Insanity, Maintenance of—Settlement—3 & 4 Vict. c. 54, s. 7.

The parish upon which an order of maintenance may be made under 3 & 4 Vict. c. 54, s. 7, in respect of a person acquitted of felony on the ground of insanity and ordered to be detained in an asylum during her Majesty's pleasure, is the parish of such person's settlement at the time of the making of the order of maintenance, not at the time of the lunatic's reception into custody, or the order for removal to an asylum by the Secretary of State.

Consequently, where an order of maintenance was made upon a parish in which the husband of such a lunatic as above mentioned had acquired a settlement subsequently to the detention of the lunatic:—

Held, that the order was rightly so made.

CASE stated on appeal to quarter sessions under 12 & 13 Vict. c. 45, s. 11, the facts of which were in substance as follows:—

On the 9th of July, 1867, Mary Coleman, the wife of Samuel Coleman, being then charged with having attempted to murder her child, was removed from the parish of Westbury-on-Trym, in the appellants' union, where she was then residing, to the county gaol at Gloucester. On the 12th of August following she was indicted for the said offence at the Gloucester assizes, and upon the trial, being acquitted on the ground of insanity, she was ordered to be detained during her Majesty's pleasure.

By a warrant dated the 30th of September, 1867, under the

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hand of one of her Majesty's principal Secretaries of State, the said Mary Coleman was ordered to be removed to the Broadmoor Criminal Lunatic Asylum, and she was thereupon duly removed under such warrant.

By an order dated the 4th of December, 1877, two justices of the peace for the county of Berks adjudged the said Mary Coleman to be legally settled in the said parish of Westbury-on-Trym in the appellants' union, and directed the appellants to pay thenceforth from the date thereof to the superintendent for the time being of the criminal lunatic asylum at Broadmoor weekly the sum of 14*s.* for the maintenance of the said Mary Coleman during her confinement therein. Against this order notice of appeal was duly given to the respondent, and it was upon the validity of this order that the opinion of the Court was sought.

The said Samuel Coleman had continuously resided within the parish of Westbury-on-Trym without any breach of residence from the year 1862, and still continued to reside there, and during such residence had always supported himself by his labour, and had never received any parochial relief. From the year 1862 until her arrest on the 9th of July, 1867, the said Mary Coleman resided with her husband, who maintained her in such parish as part of his family. It was found that in 1867 the lunatic was settled in the parish of Almondsbury in the Thornbury Union.

The contention of the respondent was stated to be that the said Mary Coleman was, at the date of the order appealed against, legally settled in right of her husband in the parish of Westbury-on-Trym by reason of her husband, the said Samuel Coleman, to whom she was married in 1860, having resided in the said parish for the term of three years and upwards next before the application for the said order, in such manner and under such circumstances in each of such years as would, in accordance with the several statutes in that behalf, render him irremovable and so having gained a settlement by virtue of 39 & 40 Vict. c. 61, s. 34.

The contention of the appellants was stated to be that the settlement of the insane person, into which the justices of the peace are directed to inquire under 3 & 4 Vict. c. 54, is the

settlement of such insane person at the date of the order for his or her removal to the lunatic asylum, and not the settlement which he or she may have at the date of the application for the order of maintenance.

The question for the opinion of the Court was whether the order of the 4th of December, 1877, adjudging the settlement of the said Mary Coleman to be in the parish of Westbury-on-Trym was upon, the facts stated, properly made. (1)

Charles, Q.C. (*J. F. Clerk* with him), for the appellants. It must be admitted that according to the decision in *Brampton Union* v. *Carlisle Union* (2) the lunatic is now settled in the parish of Westbury-on-Trym. But it is contended that the order of maintenance under 3 & 4 Vict. c. 54, s. 7, must be made upon the place of settlement at the time when the lunatic is received into custody, or the order of detention in the asylum is made. At that time the lunatic was not settled in Westbury-on-Trym, because it was before the passing of 39 & 40 Vict. c. 61, s. 34. The order may be applied for at any time, within a day or two after the order of detention or years afterwards; but it is contended that the place of settlement upon which the justices are to make the order of maintenance must be the same in any case. On looking to the provisions of 3 & 4 Vict. c. 54, with regard to persons convicted who become insane during imprisonment, it will be seen that the 2nd section, which provides for orders of maintenance in the case of such persons, is in precisely the same terms as the 7th section. Under the 2nd section it is clear that the place of settlement contemplated means the place of settlement at the time of removal from the prison to the asylum. There are no provisions for making successive orders of maintenance. The

(1) In addition to the facts above given, it appeared from the case that an order had been made by justices on the 21st of December, 1867, directing the appellant union to pay a weekly sum for the maintenance of the lunatic in the asylum, on the ground that the husband of the lunatic was irremovable from the parish of Westbury-on-Trym. This order was admitted to be void; the appellant union, however, had complied with it for a long time in ignorance of the flaw in it, but, on becoming aware thereof, refused to pay under it any longer. It was in consequence of this circumstance that it became necessary to apply for the order of the 4th of December, 1877.

(2) 3 Q. B. D. 479.

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order of maintenance is like an order of removal, and is intended to be made once for all.

McKellar, for the respondent. There is nothing in the wording of the 7th section of 3 & 4 Vict. c. 54, to necessitate the maintenance of the lunatic being charged upon any other parish than that of her settlement at the time of making the order of maintenance. The order may, it is admitted, be made at any time, and the natural construction of the words is that the place of settlement referred to is the place of settlement at the time of the making of the order.

Charles, Q.C., in reply.

MELLOR, J. I must confess to having entertained some doubt in this case, mainly arising from Mr. Charles' ingenious argument founded on the identity of language in the provision we have to construe, and that in 3 & 4 Vict. c. 54, s. 2. But I come to the conclusion that the inquiry must be into the settlement of the lunatic at the time when the application for the order of maintenance is made. The difficulty suggested may be solved by considering that the legislature, when dealing with convicted criminal lunatics, intended to disregard any change of settlement that might possibly occur in the case of a married woman through her husband's acquiring a new settlement. When I consider the consequences that would flow from our holding either way in this case, I come to the conclusion that a greater hardship would arise from the construction contended for by the appellants than from that contended for by the respondent. This woman was detained, not as a convicted criminal, but during her Majesty's pleasure merely, and she might be set at liberty directly the doctors were satisfied that she was cured, and would then go to her husband's place of settlement. It would be a strange result that she should during her detention be maintained at the expense, not of the place of settlement, where, if at liberty, she would go, but of the place of her settlement at the time when the order of detention was made. It is admitted that the inquiry into the place of settlement and order of maintenance may be made at any time, but it is contended for the appellants that the subject-matter of the inquiry must be the last legal settlement, not at the time of the inquiry, but at the time when the

lunatic was received into custody, or when the order of detention in the asylum was made. The result would be that the maintenance of the lunatic might be charged to a place which for ten years had ceased to be her place of settlement. Difficulties may arise with regard to the language of the sections relating to the maintenance of lunatics, but it seems to me that the hardship and inconsistency that would result from the appellants' contention is so great as to outweigh any other considerations. For these reasons I think our judgment must be for the respondent.

MANISTY, J. I agree that our judgment should be for the respondent. I cannot say that the case is free from doubt, but I think that if we can construe the enactments in accordance with the general law on the subject of settlement we should do so. The reason of the thing would appear to be that the parish which under ordinary circumstances would have to maintain the lunatic should maintain her when detained in the asylum. The section does not say that the inquiry is to be as to the place of settlement at the time of the making of the order of detention, or of the lunatic's being received into custody. The justices are to make the order on the overseers of the parish in which they shall adjudge such insane person "to be legally settled," not "to have been legally settled at the time of the detention." There is nothing in the words which militates against such a construction as would be in accordance with the general law. A married woman not detained on the ground of insanity follows her husband's settlement. Why should the fact that a married woman does an act for which she is not criminally responsible by reason of her insanity, and is consequently detained for the safety of the public during her Majesty's pleasure, throw the expenses of her maintenance on some other parish than that which would under ordinary circumstances have borne them?

Judgment for the respondent.

Solicitors for appellants: *Gregory, Rowcliffes, & Co., for Benson.*
Solicitors for respondent: *Solicitors to the Treasury.*

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June 21; *Dec.* 20.

THE QUEEN *v.* HOLBROOK AND OTHERS.

Libel—Criminal Information—Authority, Consent, or Knowledge of Defendant, Publication without—6 & 7 Vict. c. 96, s. 7—Liability of Proprietor of Newspaper for acts of Editor.

The 7th section of 6 & 7 Vict. c. 96, enacts that "whensoever upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part."

On the trial of a criminal information for libel against the proprietors of a newspaper it appeared that the defendants had appointed an editor with general authority to conduct the paper, and left it entirely to his discretion what should be inserted therein, and that such editor had inserted the libel in question without the knowledge or express authority of the defendants. The jury found the defendants guilty. On a motion for a new trial on the ground that the verdict was against evidence, and of misdirection:—

Held (by Cockburn, C.J., and Lush, J., Mellor, J., dissenting), that the general authority given to the editor was not per se evidence that the defendants had authorized or consented to the publication of the libel, within the meaning of 6 & 7 Vict. c. 96, s. 7; and that, as the learned judge at the trial had summed up in terms which might have led the jury to suppose that it was, and the jury had apparently given their verdict on that footing, there must be a new trial.

IN this case a criminal information had been obtained by J. Howard against the defendants, R., E. G., and A. R. Holbrook, the proprietors of the *Portsmouth Gazette*, for a libel published in that newspaper. The case was tried in the first instance before Lindley, J., at the Winchester Summer Assizes, 1877, when a verdict of guilty against all the defendants was found by the jury under the learned judge's direction. This verdict was set aside on the ground of misdirection, and a new trial ordered: see the report of the case. (1) The second trial took place before Grove, J. The facts of the case as proved on the second trial did not materially differ from those proved on the first, and are fully set out in the report above referred to and the judgments reported below. It appeared that the defendants intrusted the editorial department of the newspaper to one Green. He stated that they

(1) 3 Q. B. D. 60.

appointed him with general authority to conduct the paper, that they left it entirely to his discretion what should be put in the paper, and that they never took notice of his articles one way or the other. It appeared that the libel in question, which was in the form of a letter, was inserted by Green without the knowledge or express authority of the defendants, one of whom was absent from Portsmouth at the time. The learned judge, in summing up at the second trial, left it to the jury to say whether the general authority to the editor included an authority to publish the libel complained of. The jury found all the defendants guilty.

Cole, Q.C., moved for a rule nisi for a new trial on the ground of misdirection, and that the verdict was against evidence, contending that the learned judge had misdirected the jury, in not sufficiently pointing out to them the difference between criminal and civil proceedings for libel in regard to the effect of the general authority given to the editor by the defendants, and in not directing them that an authority with relation to the publication of the particular libel must exist since 6 & 7 Vict. c. 96, s. 7, in order to render the defendants criminally responsible.

A rule nisi having been granted,

June 21. *Charles, Q.C.*, and *A. L. Smith*, shewed cause. It is submitted that it must be a question for the jury whether the general authority given to the editor included an authority to publish the libel in question, and that the jury were fairly entitled on the evidence to come to the conclusion that there was authority to publish the libel, or an absence of due care and caution on the part of the defendants in respect of the publication of the same. *Reg.* v. *Holbrook* (1) only decided that the general authority does not necessarily and as a matter of law involve the authority to publish the particular libel, as would be the case in a civil action for libel, but it must be a question for the jury, taking all the circumstances into consideration, whether such a general authority in the particular case included authority to publish the particular article complained of. The evidence of the editor is that an altogether unlimited, plenary discretion was vested in him, and that

(1) 3 Q. B. D. 60.

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the defendants never took any notice of what he inserted either way. It would be a most dangerous result of the statute that the proprietor of a paper should escape from responsibility by giving a plenary discretion to an editor and never taking any notice of what he inserts, however libellous it may be, while at the same time he takes the profit derived from the sale of the paper. All that the statute intended was that it should no longer be the law that the proprietor should be conclusively presumed to have authorized the publication of anything inserted in the paper.

[They cited *Cooper* v. *Slade*. (1)]

Cole, Q.C., and *Folkard*, supported the rule. A general authority to conduct the editorial department of a newspaper, so far as criminal proceedings are concerned, only includes authority to conduct it lawfully. An authority to commit a crime is not to be implied. The learned judge in summing up did not sufficiently point out to the jury the difference that there is in this respect between civil and criminal proceedings. It is contended that the intention of the statute was to do away with the anomalous state of the criminal law theretofore existing with regard to libel, and to render the law of libel uniform with the remainder of the criminal law, by making the existence of a criminal intent necessary to the crime of libel. The dangerous consequences suggested on the other side do not follow, because the party libelled has his remedy by civil action against the proprietor, who is still liable civilly in respect of the conduct of his servant the editor. [They cited *Poulton* v. *London and South Western Ry. Co.* (2)]

Cur. adv. vult.

Dec. 20. The following judgments were delivered :—

LUSH, J. The question presented for our decision on this rule is substantially that which arose upon the former motion for a new trial, and which was argued in November of the last year. Upon the first trial it was proved that the literary department of the newspaper in question had been intrusted to an editor, who inserted in it what he thought fit in the way of articles, correspondence, &c. ; that of the three defendants, who were proprietors

(1) 6 H. L. C. 746, at p. 793. (2) Law Rep. 2 Q. B. 534.

of the paper, each took the management of a particular department of the business other than the literary department; that at the time of publication of the libel one of them was absent from home on account of ill-health, and that neither of them had given any authority for or consent to the publication complained of, or had any knowledge of the libellous article until his attention was called to it after the paper was in circulation. My Brother Lindley on that occasion ruled as a matter of law that, as an authority had been given to the editor to edit the paper and to insert what he thought fit without supervision or control, the libel could not be said to have been published without the authority of the defendants, within the meaning of the Act 6 & 7 Vict. c. 96, s. 7.

The Lord Chief Justice and myself took a different view of the meaning of that section, and for reasons we then gave, we held that the "authority" mentioned in the 7th section was an authority to publish the libel, and that the general authority given to the editor, to use his discretion in admitting or rejecting articles or correspondence, was not of itself sufficient under the circumstances to make the proprietor criminally responsible.

Upon the second trial, the ruling in which is now in question, the evidence of authority was carried no further than on the former occasion, but instead of holding as a matter of law that the 7th section of the Act did not protect the defendants, the learned judge left the question of authority to the jury, but without such an explanation of the meaning of the section, as appeared to the majority of the Court on the previous occasion to be required, in order to enable the jury properly to apply it to the facts. Other grounds, such as want of due care and caution, the omission to stop the sale of papers outstanding in the hands of retail sellers, when the attention of the two defendants, who were in Portsmouth, was called to the objectionable article, and the inadvertent sale in the shop afterwards of another copy of the paper, were also put forward, but the jury must have found their verdict on the question of authority, inasmuch as they implicated the absent defendant, against whom these, which I may call minor matters of complaint, were not and could not have been made. As my Brother Mellor, after a second argument, retains the opinion

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Lush, J.

which he expressed before, and as my Brother Grove, as I infer from his summing up, rather inclines to the same opinion, I have carefully reviewed the authorities and the argument, and after the best consideration which I can give to the case, I am constrained to hold that the construction of the Act which the Lord Chief Justice and myself adopted on the former occasion is the true construction. It must be admitted that the 7th section, upon which the question turns, is not so precise and clear as it might have been. In order to ascertain the intention of the legislature, we must have recourse to the well-known rule of construction laid down by Coke, C.J., in *Heydon's Case* (1): "For the sure and true construction of all statutes in general," he says, "(be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered: 1st, what was the common law before the making of the Act; 2nd, what was the mischief and defect for which the common law did not provide; 3rd, what remedy the parliament hath resolved and appointed; 4th, the true reason of the remedy, and then the office of the judges is always to make such construction as shall suppress the mischief and advance the remedy."

Pursuing this line of reasoning, the first question is, what was the law as regards the criminal liability of the proprietor of a newspaper for libel. Libel on an individual is, and has always been, regarded as both a civil injury and a criminal offence. The person libelled may pursue his remedy for damages or prefer an indictment, or by leave of the Court a criminal information, or he may both sue for damages and indict. It is ranked amongst criminal offences because of its supposed tendency to arouse angry passion, provoke revenge, and thus endanger the public peace, but the libeller is not the less bound to make compensation for the pecuniary or other loss or injury which the libel might have occasioned to the person libelled. In this respect libel stands on the same footing as an assault or any other injury to the person. But the publication of a libel, when prosecuted as a criminal offence, was treated upon an exceptional principle, and with exceptional severity. The maxim "respondeat superior," which (with rare exceptions founded on reasons not applicable to

(1) 3 Rep. 7 a.

libel, and which I will presently notice) pertains to civil liability only, was applied to an indictment for libel, and the proprietor of a newspaper in which a libellous article had been inserted was held to be criminally as well as civilly responsible for it, though he had never authorized it, nor had anything to do with its insertion, and whether the editor had inserted it by negligence or wilfully. It was not so in other cases of personal injury. If a coachman accustomed to drive were, while engaged on his master's business, by carelessness or furious driving, to cause the death of another, the master would be liable to an action for damages, but not to a criminal prosecution. The offending servant alone could be charged with the manslaughter. And if the coachman were to be found guilty of such an offence while using his master's carriage without his permission and upon his own business, or if while doing his master's work he were wantonly to assault another, the master would not be liable even to an action for damages. Subject to the exceptions already referred to, the criminal law makes no one punishable for an offence but the person who either committed it or incited and procured the other to commit it, or who aided in its commission. I need only select two cases from the books to shew what the criminal law of libel was. The one is *Rex* v. *Walter* (1). A criminal information had been filed against the proprietor of the *Times* for a libel on a lady. The defendant pleaded not guilty, and proved at the trial that, although he was the proprietor of the paper, he had nothing to do with the conducting of it, that he resided entirely in the country, and that his son was concerned in the conducting of the paper without any interference on his part. Mr. Erskine, his counsel, contended upon this evidence that, though his client might be liable in a civil suit for all acts of his agent, it was otherwise when he had to answer criminally; that though the proving him to be the proprietor of the paper might primâ facie subject him criminally, it was otherwise when it was clearly shewn that the fact of the publication was not his, nor done with his privity; that "actus non facit reum, nisi mens sit rea," so that, if the act of publication which constituted the crime was proved to be that of another, the jury would be bound to acquit the defendant. Lord Kenyon said

(1) 3 Esp. 21.

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he was "clearly of opinion that the proprietor of a newspaper was answerable criminally for the acts of his servants or agents for misconduct in the conducting of the paper, that this was not his opinion only, but that of Lord Hale, Justice Powell, and Justice Foster, all high law authorities, and to which he subscribed. This was the old and received law for above a century, and was not to be broken in upon by any new doctrine upon libel." This occurred in 1808. I have cited the case in full from the report because of its exact analogy in all material circumstances to the present case. The other case is that of *Colbourn* v. *Patmore* (1), tried in 1834. A criminal information had been filed against Mr. Colbourn as the proprietor of the *Court Journal*, for a libel on a lady. He pleaded guilty, and was sentenced to pay a fine of 100*l.* and to be imprisoned till the fine was paid. He paid the 100*l.*, and then brought an action against his editor for breach of duty in inserting the libellous paragraph, alleging that it was done without his authority or knowledge, and in violation of the contract between them. This allegation was fully proved, and a verdict was given for the plaintiff for a sum by way of damages, which included the 100*l.* penalty. A motion was then made to arrest the judgment, on the ground that the plaintiff was in contemplation of law a party to the offence, and one wrong-doer cannot have, in a court of law, contribution or redress against another who was his accomplice. The judgment was ultimately arrested, because of a defect in the pleadings, it not being alleged that the plaintiff did not sanction the circulation of the journal after he knew of the libel, and so become actual "publisher" of the libel. But the case is important for the unanimity which evidently prevailed both on the bench and between the counsel on both sides as to the state of the law. The late Mr. Justice Maule was counsel for the defendant, the editor, and it never occurred to his astute and well-informed mind to suggest that Mr. Colbourn brought the mischief upon himself by pleading guilty, and that he might have defended himself by proving the real facts. This would have been an obvious ground of defence for his client. On the contrary, he admits in his argument "the law has made the proprietor of a newspaper criminally answerable for the publication of a libel in

(1) 1 C. M. & R. 73.

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its columns, whether the libel was inserted with or without his knowledge," and his only argument was, that though the plaintiff was actually innocent, the two parties were in the eye of the law equally guilty. Sir William Follett, on the part of Mr. Colbourn, contended that, as his client was in fact innocent, the rule of law which prohibited a claim for redress by one wrong-doer against another ought not to be held applicable. Baron Alderson remarked, in the course of the argument, "Is it not more correct to say that the plaintiff was actually ignorant but legally cognisant?" He afterwards remarks, "A master is presumed to authorize the insertion of a libel; in other cases he is not presumed to authorize the wilful act of his servant, either in civil or criminal proceedings. Does not the proprietor of a newspaper give authority to the editor to publish everything libellous or not?"

This, then, was the state of the law before the Act was passed. The proprietor of a newspaper which contained a personal libel was treated as a criminal, though he had not himself committed the criminal act, nor procured or incited another to commit it, nor aided in its commission, nor knew that it was about to be committed. I think it cannot be doubted from the tenour of the act itself, apart from its historical origin, that the intention of the legislature was, amongst other things, to mitigate the rigour of the common law in this particular, and to place the proprietor of a newspaper in the same position as any other employer whose servant had in the course of his employment committed an offence against, and to the injury of, a third person. The Act is entitled, "An Act to Amend the Law of Libel," and its declared objects are—1st, the better protection of private character; 2ndly, the more effectually securing the liberty of the press; and, 3rdly, the better preventing abuses in exercising the said liberty."

The second object forms the subject of several sections, and by them the defendant in an action for libel is allowed to give in evidence in mitigation of damages, under certain conditions, an apology, and to pay money into court; and the defendant in an indictment or information is permitted to plead the truth as a justification, provided he shews that the publication was for the public benefit, and to be entitled to costs upon a verdict of not guilty. Between these latter provisions comes the 7th section, the

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true meaning of which is the question now before us. The words are, "whensoever upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care and caution on his part." Although the section is wanting in precision, it seems clear that the word "publication," wherever it occurs in the section, points to the libel and not to the newspaper. The section says nothing about newspapers; it applies to any printed or written slander, whether contained in a newspaper, book, pamphlet, handbill, or letter. What it deals with is the libel and nothing more. Again, the clause does not say what is to be the effect of proving the negative, but there can be as little doubt that it means it to be an entire defence, entitling the defendant to a verdict and not merely to a mitigation of punishment. The effect of it read by the light of previous decisions, and read so as to make it remedial, must be that an authority from the proprietor of a newspaper to the editor to publish what is libellous is no longer to be, as it formerly was, a presumption of law, but a question of fact. Before the Act the only question of fact was whether the defendant authorized the publication of the paper; now, it is whether he authorized the publication of the libel. It is true that the production of the paper which contains the libel, coupled with proof that the defendant is the proprietor, is primâ facie evidence that he caused the publication of the libel, and the onus is on him to prove the negative. But when he has proved that the literary department was intrusted entirely to an editor, the question what was the extent of the authority which that employment involved is to be tried upon the principle which is applicable to all other questions of authority. And I think the jury ought to be told, in this as in every other case, that criminal intention is not to be presumed, but is to be proved, and that, in the absence of any evidence to the contrary, a person who employs another to do a lawful act is to be taken to authorize him to do it in a lawful and not in an unlawful

manner. This is the doctrine which is applied to other cases of wrongs done by servants, when it is sought to fix with criminal liability the employer, and the statute intended to place libel upon the same footing in this respect as other torts. Otherwise the statute has afforded no remedy for an admitted anomaly, and the case of *Rex* v. *Walter* (1), if it occurred to-morrow, must be decided as it was decided in 1808. Although the employer is liable civilly for such a wrong, this is not upon the presumption of authority but by virtue of the maxim "respondeat superior," which on grounds of policy and general convenience puts the master in the same position as if he had done the wrong himself, a maxim which, as I before observed, pertains to civil and not, except in rare instances, to criminal liability. I am far from saying that the mere appointment of an editor without supervision or control may not, in some cases, involve an authority to publish libels. If the paper was a calumnious paper, its general character would negative the ordinary presumption of innocent intention, and fairly lead to the inference that the proprietor authorized the insertion of slanderous articles. But that cannot be said of a respectable paper as the one in question is admitted to be.

The exceptional class of cases to which I have referred are public nuisances. In these cases the wrong is done to the public and not to any particular individual, and in that case no one can sue for damages unless he happens to have sustained some exceptional injury. Of such a class the case of *Reg.* v. *Stephens* (2) is an illustration. The workmen of the owner of a quarry had stacked the refuse of the quarry by the side of a navigable river, in such a manner that it fell into the stream and obstructed the navigation, and although the owner proved that he lived at a distance, and did not know what was being done, and although he had given directions to the contrary, he was held criminally liable for the nuisance. Here the wrong was common to all the public, and the remedy by indictment was the only remedy. This was the ground of the decision. Libel, as I have already observed, does not belong to this class, but to the ordinary class of offences against the person. I am therefore of opinion that the direction

(1) 3 Esp. 21. (2) Law Rep. 1 Q. B. 702.

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to the jury was imperfect and the verdict wrong, and consequently that the verdict ought to be set aside.

MELLOR, J. The question for consideration in this case arose upon the trial before Mr. Justice Grove of a criminal information against the defendants, who are the proprietors and publishers of the *Portsmouth Times and National Gazette*, for a libel on a Mr. Howard, contained in that newspaper. On the trial the verdict passed against all the defendants, and they were all found guilty of the offence. There had been a former trial of the case, in which the judge had directed a verdict to be entered against all the defendants, on the ground that they did not, upon the evidence then given, come within the true intent and meaning of the 7th section of 6 & 7 Vict. c. 96.

A rule for a new trial was thereupon obtained by Mr. Cole, and afterwards made absolute, on the ground that the judge ought not to have withdrawn the question from the jury, but should have left it to them upon that evidence with a suitable direction.

The only respect in which my present judgment differs from that which I gave on the former trial is, that I think that I was wrong in holding that the judge was right in withdrawing the evidence from the consideration of the jury and deciding upon it himself. On the last trial Mr. Justice Grove left the question to the jury, with a careful and elaborate summing-up, and they thereupon found a verdict of guilty against all the defendants.

Upon the hearing of the present rule Mr. Cole, for the defendants, made several objections to the verdict, viz. on the ground that it was against the weight of the evidence, and on the ground of misdirection by the judge.

On the argument against that rule the only substantial question turned upon the construction of the statute 6 & 7 Vict. c. 96, entitled, "An Act to amend the Law respecting Defamatory Words and Libel." The recital to the first section shews the object of the Act to have been "for the *better protection of private character and for more* effectually securing the *liberty* of the press, and for better *preventing abuses in exercising the said liberty.*"

The section upon which the matter more particularly depends

is the 7th, which enacts "that whensoever upon the trial of an indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his *authority, consent, or knowledge*, and that the said publication did not arise from *want of due care and caution* on his part." I regret that there exists a difference of opinion amongst the judges who heard the argument as to the true construction of this statute. I have read the very able arguments of my Lord Chief Justice and my Brother Lush with care, and regret that I am not able to come to the same conclusion with them.

I admit the force of their reasoning, but it does not satisfy all the difficulties in the construction which press upon my mind.

I am of opinion, therefore, that the rule should be discharged, and that the verdict should stand.

The several defendants were joint proprietors of the newspaper in question, and each contributed his assistance in various departments to the management and publication of the same, but neither of them took part in the editorial management of it, but that department was by the defendants devolved upon a manager named Green, who it appeared on the evidence had procured the article in question to be written, and had caused it to be inserted in the newspaper.

The defendants were not any of them aware of the insertion of the offensive article in the newspaper until after the publication thereof, when their attention was called to it. I do not stop to refer to the subsequent sale of a single paper, or to the steps taken on the part of the defendants to stop the further circulation of the newspaper, when they became aware of the libel. I consider that the evidence of Mr. Green, the manager appointed by the defendants, raises the real question in the case, and it is upon that evidence that I base my opinion. Mr. Green being called as a witness on the part of the defendants, said that they, the defendants, "leave it entirely to my discretion what I shall put in the paper; they appointed me with general authority to conduct the paper; they have never taken notice of my articles one way

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or the other; they have never found fault with the articles." It is difficult to conceive of an authority more complete or unfettered, and it appears to me that by so constituting Mr. Green the editor with such authority the defendants must be taken to have authorized the insertion of every matter appearing in the newspaper in question. The recital in the statute defines one main object of it to have been "*the better protection of private character*" as well as the "more effectually securing the liberty of the press," which I concede to be a perfectly reasonable object. The words are, "whenever upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a *presumptive* case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge." Now, I think that these words may well be satisfied by permitting the defendant to negative, in point of fact, the *presumption* which before arbitrarily prevailed, and could not be controverted on the trial by giving in evidence the real facts. For instance, as proprietors they might have expressly forbidden the insertion of some specific libel in the paper, and have ordered it to be destroyed; nevertheless, by accident, or by design or misunderstanding, it might have got into the newspaper against their order, and without their consent. Again, they may have expressly forbidden the editor to insert any article of a defamatory character without their express authority, but the editor may nevertheless have inserted it in the newspaper without their knowledge. Other circumstances may be imagined in which libels may have been inserted in the newspaper, and for which, but for this section, they would have been liable as upon an actual authority. But so to apply it to a case like the present, where the fullest authority to conduct the paper was given, and to insert any articles at the discretion of the editor, without restriction as to their character and nature, seems strangely at variance with the recited object of the statute, viz. "for the better preventing abuses in the exercise of such liberty." But it was contended that the statute did protect proprietors of newspapers in all cases in which they had not specially known of or authorized

the insertion of the specific libel. I fear that if such a construction of this section should prevail, the other objects recited in the statute, viz. "the better *protection of private character and preventing abuses in exercising the said* liberty of the press," would be utterly lost sight of, and it would become, more properly speaking, a statute for the greater protection of newspaper proprietors, and for the more effectual encouragement of the sale of newspapers containing libellous articles. Another main consideration which influences my opinion is the increased difficulty which it introduces and imposes upon a party seeking redress in a case of a scandalous libel in which the obtaining of damages can afford no adequate satisfaction. It is true that the cases of *Rex* v. *Walter* (1), and of *Colbourn* v. *Patmore* (2), which established the criminal liability of a newspaper proprietor for the acts of his servants, were supposed to have inflicted a great hardship upon the defendant, and that these cases were doubtless in the mind of the framer of the statute in question, yet it by no means follows that he contemplated the giving of an entire immunity from liability on the part of newspaper proprietors, and it appears to me from the recitals in the statute, and the nature of its provisions, that it was not intended absolutely to reverse the rule laid down by Lord Kenyon in *Rex* v. *Walter*. (1)

I cannot help thinking that clearer and simpler language and different recitals would have been adopted had such been the case. It is argued, however, that unless such be the meaning of the section, it will be entirely nugatory. I cannot bring myself to that view of the statute; but, as I have already said, I think that many cases may be suggested in which the objects of the statute may be satisfied without so construing the words used. Should, however, such construction prevail, it will throw the greatest obstacles in the way of a prosecutor desiring to proceed criminally for a libel. Take the case of an indictment or information for a serious and scandalous libel, how is the person defamed to proceed to punish the libeller? If he attacks the proprietor, as the person who profits by the libel, and therefore apparently the right person to proceed against, he may be met by evidence on the trial that such proprietor had nothing to do with the actual management of

(1) 3 Esp. 21. (2) 1 C. M. & R. 73.

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the newspaper, but merely provided the capital necessary for its establishment, and his only interference was the receiving of the profits arising from the sale. How is the prosecutor to find out the actual libeller, whether proprietor, editor, or correspondent? and how is he to prove his identity? Surely, if the wide construction contended for had been intended by the framer of the Act, provision would have been made for the registering of the name of the editor or author who was responsible for the libel, and for enabling the prosecutor to discover who he was. Even then it might be that the editor was a man of straw, without the means of satisfying any fine or the costs of any prosecution which on conviction might be imposed upon him; he might be a person alike destitute of character and principle, hired only for his skill in defamation and his capacity to create a wretched craving to read the scandalous and libellous contents of the paper which he was hired to conduct. This is a consideration which much influences my opinion, seeing that no means are provided in a criminal case by discovery, by interrogatories, or otherwise, for ascertaining the real author or contributor. In fact, the result must be that, however scandalous the libel, the person defamed can have no real redress criminally against the actual libeller, as he, being, upon the hypothesis, a man of straw, can pay neither fine nor costs.

It may, however, be asked, What is then the provision "for more effectually securing the liberty of the press," if the meaning of the section be limited as suggested by me? I find a ready answer in the provisions of the 2nd and 6th sections, which enable a person charged criminally with libel to plead that the substance of the libel is true, and in case of an action that it was inserted without malice, and that before action he had tendered an apology; which provisions form a most material alteration in the law heretofore in force with regard to the law of libel. On the trial of the present information no doubt could be suggested that a presumptive case of publication by authority of the defendants had been established; and the only question which then remained was whether the evidence given on behalf of the defendants negatived the presumption, and shewed that the libel in question had been published without their authority, consent, or knowledge,

and that the said publication did not arise from want of due care or caution on their part.

I am of opinion that the evidence given on the part of the defendants wholly failed to establish such a defence under the statute, but on the contrary warranted the jury in finding them guilty on both divisions of the proposition which were essential to their defence. An unlimited discretion and authority had been in fact conferred on Mr. Green, the editor, to insert articles of whatever nature and character he might deem expedient to insert, and their consent was involved in the same authority; and therefore, unless it can be successfully contended that the authority, consent, or knowledge mentioned in the exempting clause of the section requires the prosecutor to prove that the particular specific libel must have been actually authorised, known of, and approved in each case, I cannot but think that the evidence sufficed to warrant the conclusion at which the jury arrived. It is true, as was observed during the arguments, that as a general rule an authority to an agent to conduct a commercial business does not extend to enable such agent by implication to make his principal liable for a crime committed by such agent. Now this may be true as a general proposition where a crime is committed by such an agent, beyond the scope of his authority, without the consent of his principal; but it has no application to a business or commercial speculation of this description, where, in the very nature of things, it is essential to the prosperity of the paper that articles of a very various character and description should be inserted. Indeed, the cases of *Rex* v. *Walter* (1) and *Colbourn* v. *Patmore* (2) shew that this must be so, as those cases proceeded upon the principle that in such a case the liability of the proprietor and superior resulted from the act of the servant. In fact, Mr. Green in the management of the editorial department was the alter ego of each of the defendants, and was in fact authorised to insert in every issue of the newspaper whatever matter he considered suitable, and likely to increase its circulation, and the insertion of the libel in question in the newspaper was clearly within the scope of his authority.

As I cannot believe that the object of the statute was to require prosecutors in such cases to prove an actual authority or consent

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to the specific libel, I cannot do other than express my opinion that the jury were justified in finding the defendants guilty. I am further of opinion, although it is not necessary in order to discharge this rule to decide it, that there was a question upon the evidence fit for the consideration of the jury, whether the publication in question arose from want of due care or caution on the part of the defendants; and I think that the jury might well think that the defendants failed to show that it did not so arise. It appears to me that for proprietors of a newspaper to devolve upon an editor the entire control and unfettered discretion as to what articles he shall insert, without requiring him to abstain from the insertion of all defamatory matter, or without making some provision for supervision by the defendants, who are the parties interested in the speculation, does exhibit a want of due care or caution on their part. The object of an editor is generally to make the paper sell, and to become a profitable speculation to his employers; and unhappily the insertion of sensational or defamatory articles has too often a great tendency to bring about so profitable a result. I think, therefore, there was evidence that the defendants did not use due care and caution in intrusting Mr. Green with unfettered authority in the management of the editorial department of their newspaper; and I am of opinion, therefore, that on all grounds the rule should be discharged.

COCKBURN, C.J. The question in this case is one of considerable importance as regards the law of libel, inasmuch as it involves the construction which is to be put on the 7th section of 6 & 7 Vict. c. 96, an enactment passed to relieve the proprietors of public journals from the heavy responsibility, so far as the criminal law was concerned, which rested on them before in respect of libellous matter published in such journals without their authority, knowledge, or consent. The state of the law which this enactment was intended to remedy was, in my opinion, inconsistent with the first and common principles of justice, and one which was discreditable to the legislation of this country.

It had been laid down authoritatively, at a time when perhaps less liberal views as to the liberty of the press prevailed, that the proprietor of a public journal, though absent, and wholly ignorant

of matter inserted in the journal by his editor, was nevertheless responsible not only civilly, but also criminally, if the matter so inserted were libellous, in direct contravention, I cannot but think, of the fundamental principle that to constitute guilt there must be a mens rea, an intention to violate the law.

It was to remedy this state of the law that the statutory enactment 6 & 7 Vict. c. 96, s. 7, was passed with which we have here to deal. It provides that, "when evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care and caution on his part." The question is as to what will satisfy the exigency of the terms by which immunity is thus given to the proprietor, on the condition of his shewing that he has not given authority for the publication of the libel. In the first place, would it be enough for the defendant to shew that he had not specifically authorized the insertion of the article or matter complained of, if it should appear that he has given authority to insert matter, whether libellous or innocent, at the discretion of the editor? I answer unhesitatingly in the negative. But it appears to me equally untenable to say that, because a proprietor intrusts the conduct of a public journal to the plenary discretion of an editor, he thereby gives authority to the editor to commit a breach of the law by the insertion of libellous matter. In the first place, let me ask if the principal in appointing and giving authority to his editor were expressly to prohibit the insertion of any libellous matter in the paper, would not, so far as the question of authority is concerned, such express prohibition be sufficient to satisfy the statute? I think the answer must be in the affirmative; for what, unless he himself superintends the insertion of every article, in which case the statute would be useless, can the proprietor do more? But surely the prohibition not to violate the law is impliedly involved in every service in which an agent is employed, and in which the law may possibly be broken by such agent. Take the case of an agent employed to buy goods on which a duty is payable, and who, to benefit his employer, buys smuggled goods unknown to the employer. The agent would be criminally

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liable. The employer would not. As it seems to me the proprietor of a public journal, who gives general authority to the editor he employs, is entitled to assume that the editor, knowing the law as well as himself, will take care, for his own sake, as well as for that of his employer, to keep within the law, by inserting nothing which would bring himself within the reach of the law, both criminally and civilly, and make his principal liable in damages which he again would be liable to make good. I am at a loss to see to what cases the statutory provision in question would be applicable if not to this. It is notorious that in many, perhaps in the majority of instances, public journals are carried on for the benefit of proprietors, who find the necessary capital, by editors employed by them, and to whom the conduct of the paper is committed without any immediate control or interference of the principal. In my opinion it was intended to exempt principals so circumstanced, if able to satisfy a jury that they had not authorized directly or indirectly the insertion of libellous matter, from being held criminally liable. It is to be observed that in both the striking cases referred to by my Brother Lush, those of *Rex* v. *Walter* (1), and *Colbourn* v. *Patmore* (2), as also in the case of *Rex* v. *Gutch* (3), the conduct of the journal had been left by the proprietor, as in this case, to the management of an editor, while the proprietor, absent at a distance, had been ignorant of the fact of the libellous matter having been published. It was to meet such cases, I cannot doubt, that this section of Lord Campbell's Act was directed. It was a remedial act, and one which, as bringing the law into harmony with general principles, should receive a liberal interpretetion. I think we should be defeating what was intended to be its operation if we were to hold that a general authority given to an editor to manage the conduct of a public journal involved an authority to publish libellous matter, and that a proprietor giving such authority still remained criminally liable for a libel, without specific authority, express or implied, for publishing such libel, or any consent to or knowledge of the same on his part. It is true that the terms in which the authority was given to the editor in the present case at first sight seem large. According to the evidence of the editor, the defendants "left it entirely to his discretion what he should put into the paper.

(1) 3 Esp. 21. (2) 1 C. M. & R. 73. (3) Mood. & M. 433.

They gave him general authority to conduct the paper; they never took notice of his articles one way or the other." But what is this beyond what is implied in the general authority given to an editor by every proprietor? What is this more than in extenso what would be implied in a general authority to conduct the paper? In my opinion, it would be to put much too strained and unwarranted a construction on such authority to treat it as giving a licence to the editor to publish libels in a paper he was employed to conduct. I have no hesitation in saying that, where a general authority is given to an editor to publish libellous matter at his discretion, it will avail a proprietor nothing to shew that he had not authorized the publication of the libel complained of. It is equally clear that though in the authority originally given to the editor no licence to publish libellous matter may have been contained, still such an authority may be inferred from the conduct of the parties, as, for instance, from the fact that other libels have been published in the paper, which have come to the knowledge of the proprietor and without his remonstrance or interference, or the removal of the editor, from which the assent of the proprietor might well be inferred. I therefore do not feel the apprehension which has been expressed of the mischief which would result from the impunity which newspaper proprietors would derive from holding them free from criminal responsibility, when they employ an editor with general authority to conduct the paper. The impunity would quickly cease if they suffered the paper to become the vehicle of calumny. There are journals as to which no jury would hesitate to say that the editors were authorized by the proprietors to invent or give currency to libel.

Protection is further afforded to individuals and the public by the immunity afforded by the statute being conditioned on the exercise of due care and caution on the part of the proprietor. Many circumstances might be held by a jury to amount to the absence of the care and caution thus required. The employment of an incompetent or untrustworthy editor, or one who had before been proceeded against for libel; total omission ever to look at the paper to see in what manner it was conducted, or, as in this very case, the omission, though taking part in the publication of the paper, to insist on having articles of a doubtful tendency

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submitted for approval, might be deemed by a jury sufficient to disentitle a proprietor to the protection of the statute. It must always be borne in mind also that it is only on the penal responsibility of the proprietor that a limit is thus placed. His liability to damages in a civil action remains as before. No hardship is therefore imposed on the individual prosecutor, who, in the eye of the law, prosecuted not on his own behalf, but on that of the public, and who may still hold the proprietor liable in damages, and, if he pleases, prosecute the editor as the publisher of the libel.

This being the view I take of the statute, it seems to me that the direction of the learned judge at the late trial was defective, in not explaining to the jury that a general authority to an editor to conduct the business of a newspaper, in the absence of anything to give it a different character, must be taken to mean an authority to conduct it according to law. I agree that as regards two of the three defendants, there may have been evidence to go to the jury of knowledge and consent on their parts; as it appears that they became aware of the article in question before the sale of the paper had come to an end, and took no steps to stop the issue of the remaining numbers of the paper, and therefore might be held to have known of and consented to the publication of the libel in such later papers. The jury might also possibly have held that as regards the two defendants who were on the spot, and who might therefore have looked at the articles before the paper was published, there was a want of due care and caution, as required by the statute. But I agree with my Brother Lush that the verdict must have proceeded on the ground of authority, as the jury have included in their finding the third partner, who was absent at a distance on account of illness, and to whom none of the other circumstances can at all apply, and as to whom, taking the view of the case which I do on the subject of authority, I think there was no case to go to the jury.

I concur with my Brother Lush, therefore, in holding that the rule for a new trial must be made absolute.

Rule absolute.

Solicitors for prosecution: *Gregory, Rowcliffes, & Co.*
Solictors for defendants: *Ford & Ford, for Feltham.*

[IN THE COURT OF APPEAL.]

1878
Dec. 10.

THE ECCLESIASTICAL COMMISSIONERS FOR ENGLAND *v.* ROWE.

Statute of Limitations—Land annexed to a Deanery becoming vested in Ecclesiastical Commissioners—3 & 4 Wm. 4, c. 27, ss. 2, 29—3 & 4 Vict. c. 113, ss. 50, 57, 75—Inclosure—Allotment to Tenant in right of his Lease.

Where land annexed to a deanery has become vested in the Ecclesiastical Commissioners by virtue of 3 & 4 Vict. c. 113, s. 50, their right of entry upon it is taken away by 3 & 4 Wm. 4, c. 27, s. 2, when twenty years have elapsed without their obtaining possession thereof, although the dean to whose estate they have upon his death succeeded might have recovered the land within sixty years by force of 3 & 4 Wm. 4, c. 27, s. 29, and although by 3 & 4 Vict. c. 113, s. 57, the Ecclesiastical Commissioners have, for the purpose of obtaining possession of land vested in them under s. 50, all "rights, powers, and remedies, at law and in equity," which belonged to the dean.

Pursuant to an Act for the inclosure of certain common lands in the parish of A., the commissioner, acting in execution thereof, by his award made in 1827 allotted a piece of land to the personal representatives of R. M., in right of the lease of the *George and Dragon* in A., held under the Dean of A. The *George and Dragon* was the property of the Dean of A., and until 1820 was held under a lease to trustees for the next of kin of R. M.; in that year the lease was sold to J., who surrendered it and obtained a new lease. After 1820, several leases of the *George and Dragon* were granted, but none of them included the piece of land allotted as above-mentioned. The Dean of A., who was living at the passing of 3 & 4 Vict. c. 113, died in 1854, and thereupon by force of that statute the lands annexed to his deanery vested in the plaintiffs, who, in 1859, purchased the then subsisting lease of the *George and Dragon*, and acquired possession thereof; but they never obtained possession of the piece of land allotted as above-mentioned, and in 1877 brought the present action to recover it. The defendant had been in possession of the piece of land for twenty, but not for sixty, years:—

Held, that notwithstanding ss. 50, 57, and 75, of 3 & 4 Vict. c. 113, the title of the plaintiffs, if any ever existed in the Dean of A., was barred by the lapse of twenty years, the period of limitation prescribed by 3 & 4 Wm. 4, c. 27, s. 2, and that they could not avail themselves of s. 29 of that statute, which allows deans and other spiritual corporations sole to recover land within sixty years.

Quære, whether under the award the reversion in the piece of land allotted in respect of the *George and Dragon* passed to the Dean of A., and whether he ever had any title thereto.

Cited by H. of L. 5 App. Cas. 736.

ACTION for the recovery of land.

The facts and arguments are sufficiently stated in the judgment of the Court.

Nov. 19, 21, 22. *McIntyre, Q.C.*, and *Clement Higgins*, for the plaintiffs.

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Herschell, Q.C., and *Morgan Lloyd, Q.C.*, for the defendant.

Cur. adv. vult.

Dec. 10. The judgment of the Court (Bramwell, Brett, and Cotton, L.JJ.) was delivered by

COTTON, L.J. This was an appeal of the defendant from a judgment of Mr. Justice Mellor in favour of the plaintiffs after trial without a jury. The action was brought to recover two closes of land called 137 and 137A, which at the time when the action was brought were in the possession of the defendant. After action brought, the defendant admitted the title of the plaintiffs to the parcel of land No. 137, but defended the action so far as it sought to recover 137A.

In the year 1808 an Act was passed authorizing the inclosure of certain common lands in the parish of St. Asaph. In the year 1827 the commissioner (acting in the execution of this Act) made his award, whereby the parcel of land in question was awarded as follows: "To the personal representatives of Robert Morris, late of Saint Asaph, aforesaid, innkeeper, deceased, assigned and allotted in right of the lease of the *George and Dragon* and other premises in Saint Asaph, under the said Dean of Saint Asaph." Though the award was not completed until 1827, it appears that the allotment was made in 1816. The *George and Dragon*, in respect of which the allotment was made, was the property of the Dean of St. Asaph, and until the year 1820 was held under a lease granted by the then Dean of Saint Asaph to two persons named Lloyd, as trustees for the next of kin of Robert Morris. This lease was in the year 1820 sold to Hugh Jones, who in 1820 obtained on the surrender of the old lease a new lease. There were several leases of the *George and Dragon* made after 1820, but none of them included the allotment now in question. By 3 & 4 Vict. c. 113, the estates of all deans passed to the Ecclesiastical Commissioners, but under the 75th section of the Act this was to be subject to the right of every dean then living to the estates of his deanery during his life; and it appears from the statement of claim, that the Dean of St. Asaph living at the time when the last-mentioned Act passed died in April, 1854, and that thereupon the plaintiffs became entitled in possession to the

estates of the deanery. It is admitted that the freehold and reversion of the *George and Dragon* formed part of the estates of the deanery, and the plaintiffs in the year 1859 purchased the then subsisting lease of that inn and acquired possession thereof. But they never obtained possession of the allotment now in question, and this action was not commenced until the year 1877.

Two questions were raised on the part of the appellant, the defendant in this action: first, that the plaintiffs had not shewn that the Dean of St. Asaph ever had any title to the allotment in question; and, secondly, that if this was decided in the plaintiffs' favour, the Statute of Limitations was a bar to this action. Mr. Justice Mellor found as a fact, that the defendant had been in possession adverse to the title of the plaintiffs for twenty years, but not for sixty years, that is, that the right of the plaintiffs to bring this action accrued more than twenty years, but not sixty years, before the issuing of the writ, and he decided the question of title and the question raised under the Statute of Limitations in favour of the plaintiffs. (1) The question, whether the Dean of St. Asaph ever had any title to this allotment, is not free from difficulty. Neither the private Act, which has been already mentioned, nor the general Act in force when the award was

(1) May 10, 1878. On further consideration before Mellor, J.

Clement Higgins, for the plaintiffs.

Morgan Lloyd, *Q.C.*, for the defendant.

Cur. adv. vult.

May 16. MELLOR, J., delivered the following judgment:—"In this case I direct the verdict to be entered for the plaintiffs. The allotment, as set out in the statement of claim, to the representatives of Robert Morris in right of the lease of the *George and Dragon* and other premises under the said dean does not affect the right of the Dean of St. Asaph, and was probably a true description of the persons interested in the lease of the *George and Dragon* when the claim was sent in; and considering the subsequent dealings of the Dean of St. Asaph with the *George and Dragon*, I am of opinion, unless the defendant has a sufficient bar to the plaintiffs' claim by enjoyment of more than twenty years of the allotment 137a, that the plaintiffs are entitled to recover. I find that the defendant had possession of the allotment 137a adverse to the title of the plaintiffs for upwards of twenty years, but not for sixty years, and I am of opinion that the Ecclesiastical Commissioners have under 3 & 4 Vict. c. 113, s. 57, the same right during the same period of obtaining possession of the allotment 137a, which the holder of the deanery of St. Asaph would have had in respect of the same. I therefore find my verdict for the plaintiffs, and give judgment accordingly."

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made (41 Geo. 3, c. 109), contain any express enactment as to the title of a reversioner to an allotment made to his tenant in respect of his lease. We have not been furnished with a copy of the award, and there is no evidence as to the circumstances under which the allotments mentioned in the award were made to the dean, and as we are of opinion that the Statute of Limitations affords a good defence to the action, even assuming that under the award the reversion of the allotment made in respect of the *George and Dragon* vested in the dean, we think it better not to give any opinion on this question. (1)

As regards the defence of the Statute of Limitations, the plaintiffs contend that Pears, from whom the defendant bought in 1863, had been in possession of the allotment in question as tenant of the dean. If this point was raised at the trial, Mr. Justice Mellor found as a fact against the plaintiffs, and we are of opinion that there is no ground for disturbing his finding, if any, on this point, and further, that the evidence shews that the plaintiffs' contention in this respect is not well founded. In our opinion the allotment referred to in the deed relied on by them is that described in the statement of claim as 137, in respect of which no question now arises. But then it is urged on behalf of the plaintiffs that the Dean of St. Asaph would, under s. 29 of the 3 & 4 Wm. 4, c. 27 (2), have been able to bring his action within

(1) As to this question the following statutes and authorities were cited in the course of the argument: 41 Geo. 3, c. 109, s. 7; 48 Geo. 3, c. cxxxi. (entitled "An Act for inclosing lands in that part of the parish of St. Asaph, in the counties of Flint and Denbigh, which is not within the franchise of Rhûddlan, in the said county of Flint," and being the Act under which the common lands mentioned in the judgment were inclosed and the allotment made to the representatives of Robert Morris): *Doe* v. *Davidson*, 2 M. & S. 175; *Farrer* v. *Billing*, 2 B. & Ald. 171; *Doe* v. *Langfield*, 16 M. & W. 497.

(2) By 3 & 4 Wm. 4, c. 27, s. 1, "the word 'person' shall extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons, as well as an individual."

Sect. 2: "After the 31st day of December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or, if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same."

Sect. 29: "It shall be lawful for

sixty years from the time when his right to do so first accrued, and that the effect of 3 & 4 Vict. c. 113, s. 57 (1), was to give the plaintiffs the same time to bring their action. Mr. Justice Mellor found, and it is conceded by the defendant correctly, that

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any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make any entry or distress, or to bring an action or suit to recover any land or rent, within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress, or bring such action or suit, shall have first accrued; (that is to say), the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will, with the time of the holding of such two persons and such six years, make up the full period of sixty years; and after the said 31st day of December, 1833, no such entry, distress, action, or suit, shall be made or brought at any time beyond the determination of such period."

The 3 & 4 Wm. 4, c. 27, is in part repealed by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), from and after the 1st day of January, 1879, and other provisions are substituted.

(1) By 6 & 7 Wm. 4, c. 77, s. 1, the Ecclesiastical Commissioners for England were constituted a body corporate with power to sue and to be sued and to hold lands.

By 3 & 4 Vict. c. 113, s. 50, "Subject to the provisions herein contained, all the estate and interest which the holder of any deanery or canonry not suspended by or under the provisions of this Act, and his successors, have and would have in any lands, tithes, and other hereditaments or endowments whatsoever annexed or belonging to or usually held or enjoyed with such deanery or canonry (except any right of patronage), or whereof the rents and profits have been usually taken and enjoyed by the holder of such deanery or canonry, as such holder, separately and in addition to his share of the corporate revenues of such chapter, shall, without any conveyance or assurance in the law other than the provisions of this Act, accrue to and be vested absolutely in the Ecclesiastical Commissioners for England, for the purposes of this Act."

Sect. 57: "The Ecclesiastical Commissioners for England shall, for the purpose of enforcing payment of all profits and emoluments to be paid to them, and of obtaining possession of all lands, tithes, or other hereditaments vested in or accruing to them as aforesaid, and of recovering the rents and profits thereof, have and enjoy all rights, powers, and remedies, at law and in equity, which belonged, or belong, or would belong or have belonged, to the holder of the deanery, canonry, prebend, dignity, or office, or the rector of the rectory, in respect of which such profits and emoluments, lands, tithes, and other hereditaments

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the defendant had not been in possession for sixty years, and he decided as matter of law that under these circumstances the plaintiffs' action was not barred by the statute. We are unable to agree with this decision.

The plaintiffs are within the 2nd section of 3 & 4 Wm. 4, c. 27, unless they shew any statutory enactment, which exempts them from the statutory bar of twenty years. The plaintiffs contend that the combined effect of the 57th section of 3 & 4 Vict. c. 113, and of s. 29 of the Act of Wm. 4 gives them such exemption. It is urged that s. 29 of the Act of Wm. 4 gives deans and other corporations sole mentioned in it such a privilege in the nature of a right or power, as by s. 57 of the Act 3 & 4 Vict. vests in the Ecclesiastical Commissioners. But this, in our opinion, cannot be maintained. The 29th section, it is true, begins with the words: "Provided always it shall be lawful": words, which, if taken without reference to the rest of the statute in which they occur, look as if they conferred a right or power on the corporations therein mentioned. But the statute is not one which confers any right or power; on the contrary, it restricts the rights, powers, and remedies, which independently of its provisions owners of property would possess, by prescribing a limited time, within which they must enforce the rights and pursue the remedies, which they independently of the Act possess. Although the 29th section seems to be enabling, yet in truth this and the 2nd section are statutory enactments, that deans and other ecclesiastical corporations sole shall not bring any action to recover land except within the period mentioned in s. 29, and that all other persons shall not do so except within twenty years from the time when the right first accrued.

It was much pressed upon us that the consequence of holding that the Ecclesiastical Commissioners are within s. 2 of 3 & 4 Wm. 4, c. 27, would be that at the time of the passing of 3 & 4 Vict. c. 113 the Ecclesiastical Commissioners might have no

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and endowments respectively are by or under the provisions of this Act to be paid or accrue to and be vested in the said commissioners."

Sect. 75: "Nothing in this Act contained respecting . . . . the severance of separate property . . . . shall affect any dean, canon, prebendary, dignitary, or officer in possession at the passing of this Act."

power to recover property belonging to the deanery, for which the then dean would have forty years to sue, and that it could not have been intended that the Ecclesiastical Commissioners should thus lose property, which the dean could have recovered. It is probable that the attention of parliament was never directed to the point, and that there was no intention either way. But the supposed inconvenience is much lessened by the fact that, during the life of a dean living at the time when the Act of 3 & 4 Vict. c. 113 passed, the dean and not the Ecclesiastical Commissioners would be entitled to bring an action to recover property of the deanery, and during this period the Ecclesiastical Commissioners could make inquiries as to the property of the deanery, and might arrange with the dean to recover any property in those cases, where, though an action by them would be statute-barred, the dean could still bring an action. In our opinion the decision on this point in favour of the plaintiffs would lead to this result, that the Ecclesiastical Commissioners could always bring an action to recover land vested in them under 3 & 4 Vict. c. 113, s. 50, even that of which they at one time had possession, at any time within sixty years from the time when the right to do so first accrued, and that they would not be barred from bringing an action to recover land acquired by them under the last-mentioned Act till the lapse of the period mentioned in s. 29 of the Act of 3 & 4 Wm. 4, c. 27, while they would be barred by the lapse of twenty years from bringing an action to recover other estates derived from persons not mentioned in s. 29. These are inconveniences at least as startling as that suggested by the plaintiffs as the result of a decision, that twenty years is a bar. But the question is not one of convenience or inconvenience. It is whether there is sufficient to prevent an action by the Ecclesiastical Commissioners being barred by the limitation contained in s. 2 of the Act. We are of opinion that there is not, and that an action brought by them is barred not by the period given by s. 29, but by that enacted in s. 2.

Judgment for the defendant.

Solicitors for plaintiffs: *Jennings-White & Buckston.*
Solicitors for defendant: *Field, Roscoe, & Co.*

1878
Nov. 29.

[IN THE COURT OF APPEAL.]

GRIFFITHS AND OTHERS *v.* BRAMLEY-MOORE AND OTHERS.

Marine Insurance—Deduction from Freight for Sea-damage—Insurance against loss of Freight—Extent of Underwriters' Liability—Calculation of.

The plaintiffs, shipowners, entered into a charterparty which provided for payment of freight at a specific rate, and that "If any portion of the cargo be delivered sea-damaged the freight on such sea-damaged portion to be two-thirds of the above rate." They effected an insurance with underwriters, "To cover only the one-third loss of freight in consequence of sea-damage as per charterparty." Sea-damage happened, and one-third of the freight on the sea-damaged portion of the cargo was deducted by the charterers from the total amount of freight:—

Held, that the subject-matter of insurance was "the one-third loss of freight in consequence of sea-damage," and that the plaintiffs were entitled to recover from each underwriter such proportion of the amount of the loss as the amount of his subscription bore to the total sum for which the underwriters subscribed the policy.

CLAIM that the plaintiffs agreed by charterparty that their ship should carry and deliver a cargo of rice, and "that the charterers should pay freight on true delivery of cargo after the rate of 3*l.* 7*s.* 6*d.* per ton, subject to deductions as in the charterparty specified. The charterparty contained the following clause: "If any portion of the cargo be delivered sea-damaged, the freight on such sea-damaged portion to be two-thirds of the above rate, except only in case the vessel shall have been stranded."

The plaintiffs entered into a policy of insurance at the foot of which was the following clause: "To cover only the one-third loss of freight in consequence of sea-damage as per charterparty, unless the ship be stranded, sunk, or burnt." The names of the defendants and the amounts of their respective subscriptions were written thereunder. The consideration expressed in the policy was 10*s.* per cent. The cargo was carried to London and there discharged, and during the continuance of the risk a portion of the cargo was delivered sea-damaged, and thereby the plaintiffs lost one-third of the freight on such sea-damaged portion. The total freight on the cargo was 3871*l.* 16*s.* 3*d.*, and one-third of the total freight was 1290*l.* 12*s.* 1*d.*, of which 1200*l.* formed the subject of insurance under the policy.

The one-third of the freight lost by the plaintiffs on the sea-damaged portion of the cargo amounted to 293*l.* 15*s.* 7*d.* The amount therefore due and payable to the plaintiffs under the policy was 273*l.* 13*s.* 8*d.*

By reason of the premises the plaintiffs alleged that they had become entitled under the policy to recover from the defendants respectively so much of 273*l.* 13*s.* 8*d.* as was proportionate to the sums for which the defendants respectively subscribed the policy.

The plaintiffs claimed the specific amounts so calculated to be due from each defendant and interest thereon.

Defence (inter alia) that, assuming the total freight to have been 3871*l.* 16*s.* 3*d.*, and the amount lost to have been 293*l.* 15*s.* 7*d.*, the plaintiffs were entitled under the policy to the proportion of the loss which the amount insured bore to the whole freight and to no more, and that the defendants before action tendered the same which being refused they paid into court.

5. In the alternative the defendants alleged that at the time of effecting the policy it was represented by the plaintiffs to the defendants, and expressly agreed between them, that the policy should apply to recover the whole of the freight, and that any claim should be calculated on the whole amount of freight, and not on one-third thereof, and that the defendants executed the policy on the faith of such representation, and that the plaintiffs were endeavouring contrary to their representation and to good faith to avail themselves of a mistake in the form of the policy.

Issue thereon.

At the trial at the London sittings before Denman, J., the jury negatived the allegation in par. 5, the issue on which was the only question left to them, and the learned judge directed judgment to be entered in favour of the plaintiffs for the full amount of their claim.

The defendants appealed.

Cohen, Q.C., and *J. C. Mathew*, for the defendants. First. The insurance is not, as literally stated in the policy, a "loss," but an insurance of freight against loss. The whole freight is insured. This is evident from the low rate of premium taken by the under-

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writers. The premium is calculated on the assumption that the liability will not be determined by the proportion which the subscription bears to the amount of the loss, but by the proportion which the subscription bears to the total amount insured. It is an insurance of the freight against a contingency which will reduce it by one-third. There is no hardship in the necessity of insuring the whole freight to protect one-third, because the premium is regulated in accordance with that system of insurance. *Hendricks* v. *Australasian Insurance Co.* (1)

Secondly. The policy does not sufficiently describe the subject-matter of insurance. The space usually occupied in such policies of marine insurance by the description of the subject-matter is left blank in this policy, and there is no description of the subject-matter of insurance unless the final clause can be treated as description. But it is inaccurately expressed. There is an ambiguity, and no consensus ad idem, and so the policy is invalid: *Raffles* v. *Wichelhaus.* (2)

Holl, Q.C., and *Witt*, for the plaintiffs, were not called upon to argue.

BRAMWELL, B. I think this a very plain case. The plaintiffs had freight coming to them which might come to them at one or the other of two rates. If all the cargo arrived they would get a certain sum; if all was damaged, there would be a deduction of one-third in respect of it, and if part only, they would suffer a deduction in respect of that part. They stood, therefore, to lose one-third of the freight, more or less, or none. They desired to guard against that loss, and insured one-third of the freight, saying, as it were, "We assure 6*s.* 8*d.* out of every pound that comes to us as freight." The policy is "to cover only the one-third loss of freight as per charterparty," and the charterparty explains it. The argument of Mr. Mathew is that this is an insurance on the whole freight, and that although the utmost total loss can be only one-third of the freight, yet that the shipowner must insure the whole freight to get that one-third. It seems an unreasonable proposition. But the learned counsel endeavours to justify it by suggesting that, in consideration of the shipowners insuring the

(1) Law Rep. 9 C. P. 460. (2) 2 H. & C. 906; 33 L. J. (Ex.) 160.

whole freight, the underwriters accept a proportionately small premium. That seems a very roundabout process; it is surely better to insure one-third only—or 6*s.* 8*d.* out of every pound—as they did here.

BRETT, L.J. The first point taken is that there is no description of the subject-matter insured, because the description relied on is not in the usual place in the policy. If it is not a description of the subject-matter insured, there is no description of any subject-matter insured, and there is no policy. Is it a true proposition to say that because such a sentence as this is not in the usual place in the policy it is not a description of the subject-matter? I cannot believe it. Mr. Cohen did not answer my question, whether, if the clause were written lengthwise across the policy, it would not be operative; but because it is written at the bottom, in a place which would hold it, he says it is not. I am of opinion that it is a description, and the only description of the subject-matter of insurance. Then what is the subject-matter of insurance? It is not freight other than chartered freight, because no other freight than chartered freight was at risk. It must be on charterparty-freight or part of it. Moreover, it is shewn to be so by the very description of the subject-matter insured. Therefore the question is whether the subject-matter of the insurance is the whole charterparty-freight or only a part of it. It is said that the subject-matter of the insurance is not a loss; but the very words used are that the subject-matter of insurance is a loss; it is "the one-third loss of freight in consequence of sea-damage as per charterparty." That sends us to the charterparty to see what was the subject-matter of insurance, and in the charterparty we find that freight is to be payable, on true delivery of cargo, at so much per ton; but then there is a provision in the charterparty that "If any portion of the cargo be delivered sea-damaged, the freight on such sea-damaged portion to be two-thirds of the above rate." Well then, if any portion of the cargo is delivered sea-damaged, there is a loss under the charterparty, and that loss is a loss of a portion of the freight on that portion of the cargo delivered sea-damaged, and that loss is one-third. Then, turning from that clause in the charterparty back to the policy

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to see what is the subject-matter of insurance, we find it is the loss—the one-third loss accrued on the charterparty under and by virtue of the clause I have read. That is the subject-matter of insurance, and there is no other. The subject-matter of the insurance is "the loss of freight in consequence of sea damage, mentioned in the charter-party."

Such being the subject-matter of the insurance, what is the true mode of construing the whole of the policy? It is that when written and signed every part of the policy is to be applied which relates to the subject-matter of the insurance. It it said that some parts of the policy could not be applied to such a subject-matter of insurance. And this is used as an argument to shew that this is not the subject-matter of the insurance. The rule above enunciated answers the suggestion. Then it is asked what is the nature of the loss? This policy, and some others of a similar kind, are peculiar and exceptional, as it seems to me, in this, that although the subject-matter of insurance is accurately defined or described, it or the quantity of it is not ascertained until the loss has occurred. The subject-matter, though defined in the policy, is not completely ascertained till the loss. The only peril is the peril by sea damage; the only thing insured is one peculiar loss caused by such peril; it seems to me to follow that the only loss that could be recovered under this policy is a total loss. The subject-matter of insurance being a loss on the cargo which receives sea damage, there can be no loss in this case but a total loss, and if there is a total loss then the underwriter is liable to the full amount of his subscription. So he is liable for this loss as for a total loss, and the ordinary rule of calculating such a loss must he applied.

COTTON, L.J. The question is whether there is or no sufficient description of the subject-matter insured. I have no doubt as to the construction of the clause in the charterparty; if the cargo arrives in good condition a certain sum, say 3000*l.*, is payable as freight, but if any part arrives sea damaged then there is to be a deduction so as to make only two-thirds payable, so the difference of one-third in respect of sea-damaged cargo is the loss against which the insurance is effected.

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I find there is in this clause a reference to the subject-matter insured, that is to say, to the difference between the full freight and the freight payable if the cargo arrives sea-damaged. "To cover only the one-third loss of freight in consequence of sea damage as per charterparty." There can be no doubt what is the sea damage as per charterparty, and the difference is, I think, not inaptly described in the policy as "the one-third loss of freight in consequence of sea damage."

Judgment for the plaintiffs. (1)

Solicitors for plaintiffs: *Pritchard & Son.*
Solicitors for defendants: *Walton, Bubb, & Walton.*

THE QUEEN ON THE PROSECUTION OF THE METROPOLITAN BOARD OF WORKS *v.* LEE.

Nov. 11.

Metropolitan Building Act (18 & 19 *Vict. c.* 122), *ss.* 3, 69, *to* 74—*Dangerous Structure*—"*Owner*"—*Incumbent of Church*—*Liability for Repair.*

The incumbent of a district church in the Metropolis, although the freehold of such church is vested in him under the Church Building Acts, is not the "owner" of the church within the meaning of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122 Part 11, Dangerous Structures), so as to be personally liable for the expenses incurred by the Metropolitan Board of Works in respect of such church as a dangerous structure.

RULE calling on a metropolitan police magistrate to shew cause why a mandamus should not issue, commanding him to grant a distress warrant against the Rev. F. G. Lee, for 105*l.* 19*s.* 5*d.* and costs, the amount of the expenses incurred by the Metropolitan Board of Works in securing a dangerous structure, namely, All Saints Church, Lower Marsh, Lambeth, Surrey.

It appeared that the defendant, the Rev. F. G. Lee, was the incumbent of All Saints Church above-mentioned, the church having been built under the Church Building Acts, and the freehold of it vested in him according to 8 & 9 Vict. c. 70, s. 13. In May, 1875, a surveyor appointed by the board certified that in his opinion the structure was in a dangerous state, and that the

(1) See *Joyce* v. *Kennard*, L. R. 7 Q. B. 78.

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decayed parts of the stone work of the upper part of the tower and the pinnacles at the base of the spire ought to be taken down or secured. Notice was accordingly served by the board on the defendant, commanding him to take down or otherwise secure the structure in accordance with this certificate, and upon his default a summons was issued directed to the "owner" of the church requiring the work to be done, and upon the hearing a magistrate made an order in the terms of the summons. The work still not being done it was completed by the board, and an order was made by a magistrate for the payment by the defendant of the expenses incurred by the board. A further summons, for the defendant to shew cause why a distress warrant should not issue against him to levy the amount, was dismissed by the magistrate.

The defendant in person shewed cause.

The incumbent of a district or parish church does not come under the description "owner" in 18 & 19 Vict. c. 122, ss. 72, 73. (1). The term "owner" is by s. 3 applied to the person in

(1) The Metropolitan Building Act, 1855, 18 & 19 Vict. c. 122 (Part 11, Dangerous Structures), s. 69: "Whenever it is made known to the commissioners hereinafter named that any structure is in a dangerous state, such commissioners shall require a survey to be made by the district surveyor or by some other competent surveyor.

Sect. 71: "Upon the completion of his survey, the surveyor employed shall certify to the commissioners his opinion as to the state of any such structure."

Sect. 72: "If such certificate is to the effect that the same is in a dangerous state, the commissioners shall cause notice in writing to be given to the owner or occupier of such structure requiring him forthwith to take down, secure, or repair the same, as the case requires."

Sect. 73: "If the owner or occupier to whom notice is given as last aforesaid, fails to comply as speedily as the nature of the case permits with the requisition of such notice, the commissioners may make complaint thereof before a justice of the peace, and it shall be lawful for such justice to order the owner, or on his default the occupier of any such structure to take down, repair, or otherwise secure to the satisfaction of the surveyor, &c., such structure, or such part thereof as appears to him in a dangerous state, within a time to be fixed by such justice, and in case the same is not taken down, repaired, &c., the commissioners may cause all or so much of such structure as is in a dangerous condition to be taken down, repaired, or otherwise secured, and all expenses incurred by the said commissioners in respect of any dangerous structure shall be paid by the owner of such structure, but without prejudice to his right to recover the same from any lessee or other person liable to the expenses of repairs."

Sect. 97, sub-s. 6: "If a default is made by any owner or occupier in payment of any expenses hereby made payable by him in the first instance,

receipt of the rents and profits of the land; but no rents and profits properly speaking are derived from the church. The profits of the benefice do not issue from the church taken as a structure, and would continue if the church were burned down or destroyed.

F. M. White, Q.C. (*Biron*, with him), in support of the rule. The defendant is "owner" within the meaning of ss. 71, 72. It is for the public benefit that metropolitan churches equally with other buildings should be kept in repair. The freehold of the church is vested in the defendant as incumbent, and if he is not liable the cost of putting a large number of buildings in repair will be thrown on the general rates. At the time of the passing of the Act, which expressly includes churches under the term "public buildings," it was supposed that there was a duty upon the parishioners to repair the fabric, and for this purpose to raise money by rates. If, therefore, the incumbent were made primâ facie responsible he would have had his remedy over against the parish. The fact that church rates have since by 31 & 32 Vict. c. 109 been abolished, cannot affect the construction of the earlier statute.

COCKBURN, C.J. This rule must be discharged. The material question for our consideration is whether the defendant is "owner" of the church, within the meaning of that part of the statute which relates to dangerous structures, and I cannot bring my mind to the conclusion that he is. It was generally believed at the time when the Act passed that the parishioners were not immediately liable to the repairs of the church, but that they could be compelled to impose a rate upon themselves for the purpose. It was

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such expenses and moneys may be recovered in a summary manner."

By s. 3 "'Public Building' shall mean every building used as a church, chapel, or other place of public worship. 'Owner' shall apply to every person in possession or receipt either of the whole or any part of the rents or profits of any land or tenement."

32 & 33 Vict. c. 82, s. 4. The powers conferred upon the commissioners of police as above are transferred to the Metropolitan Board of Works.

By 31 & 32 Vict. c. 109, s. 1. From and after the Act no proceeding is to be taken to enforce the payment of any church rate.

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found that these rates led to much litigation and ill feeling, and the legislature ultimately took away the power to compel payment of them, but it cannot be presumed that it was ever the design of the legislature that the duty of repairing a church, in which the clergyman has only a passing interest, should be cast upon him. If this had been the intention of the legislature it would have carried it into effect by express and positive enactment, and we find no such provision. The application of the term "owner" in the interpretation clause to every person in possession or receipt either of the whole or any part of the rent or profits of any land or tenement, or in the occupation of such land or tenement, is strongly in favour of the defendant. The incumbent does not receive the rents or profits of the church and he is not in occupation of it. And further, the provision in s. 73, reserving the right of the owner to recover the expenses from any lessee or other person liable to the expenses of repairs, is inapplicable to the incumbent of a church. I cannot think that it was ever meant to make this gentleman liable, and it is quite certain that to do so would be the height of injustice.

MELLOR, J. I am of the same opinion. Sect. 3 of the Act which declares that "public building" shall mean every building used as a church, chapel, or other place of public worship, primâ facie includes the present church. But we still have to decide whether the defendant is "owner" of it within s. 72. If we hold that he is, the effect of our decision would be to treat as owner one who is not in possession of the rent and profits of the building. There was formerly power to have the church repaired by means of rates, the payment of which was enforced by spiritual censures. This power has now been taken away, a circumstance which cannot affect the construction of the statute, but which is an additional reason why we should not make the incumbent liable, who has so far as we can see no remedy over against any other person.

Rule discharged.

Solicitor for Metropolitan Board of Works: *R. Ward.*

THE QUEEN *v.* TURMINE.

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Nov. 11.

Elementary Education Act (33 & 34 *Vict. c.* 75, *Second Schedule, First Part*), *Rules* 12, 14—*Election of Members of School Board—Disqualification for Re-election—Absence for Six Months from Meetings.*

A member of a school board who, in accordance with 33 & 34 Vict. c. 75 (Second Schedule, First Part), Rule 14, ceases to be a member, by reason of six successive months' absence from the meetings of the board without sufficient excuse, is not permanently disqualified for the office, but is re-eligible for election at any succeeding triennial election of members of the board.

RULE calling on E. C. Turmine to shew cause why an information in the nature of a quo warranto should not be exhibited against him, to shew by what authority he claimed to exercise the office of member of the school board of Minster, Sheppey, Kent, upon the ground that he was, on the 29th of December, 1877, and had ever since been, disqualified for election to the office by reason of his having theretofore ceased to be a member, in consequence of having absented himself during six successive months from all meetings of the school board, not being prevented by temporary illness nor any lawful cause approved by the board.

The defendant was elected member of the school board in December, 1874. In September, 1875, the board passed a resolution that he had ceased to be a member of the board, by reason of his having absented himself from its meetings for a period of six successive months, and on the 3rd of January, 1877, elected a member to fill up the vacancy. In the December following the triennial election of members took place, and the defendant being one of the candidates was officially returned as duly elected. The above rule was then obtained.

Winch, shewed cause. The defendant was not proved to have absented himself from the board meetings for six months within the meaning of Rule 14 (1), for the board did not hold the

(1) The Elementary Education Act, 1870 (33 & 34 Vict. c. 75, Second Schedule, First Part), contains the following rules:—

Rule 12: "Any person who ceases to be a member of the school board shall, unless disqualified as hereinafter mentioned, be re-eligible."

By Rule 14: "If a member of the school board absents himself during

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meetings prescribed by the Act, so as to give him an opportunity of attending them. But assuming that the non-attendance was proved, the rule does not prevent him from offering himself as a candidate at the next triennial election. [He was then stopped.]

Kemp, Q.C. (*Cock*, with him), in support of the rule. The words "unless disqualified as hereinafter mentioned" in Rule 12 can only refer to the grounds for which the member's office is vacated, as stated in Rule 14.

[COCKBURN, C.J. Rule 12 may mean that any member who has so absented himself shall lose his office for the remainder of his term, but that he shall be re-eligible as a candidate at the next triennial vacancy. If it does not mean this, all I can say is, that there is no description whatever in the Act of what shall "disqualify" a candidate.]

The offences enumerated in Rule 14 are such as to make it expedient that the person committing them should not be allowed to be re-elected, for otherwise he might be re-elected after a very short interval of time.

COCKBURN, C.J. This rule must be discharged. The language of the Act is certainly more or less ambiguous, but it seems to me that those who support this rule are in this dilemma. Either the view I suggested during the argument—that the Act means that the member is to be disqualified from office till the next triennial election—is the correct one; or I can only guess that the legislature meant to introduce a section stating the causes of disqualification, which by some blunder was left out. If the latter be the right view, we cannot supply what is defective in the statute. The fact that, if Rule 14 is referred to in Rule 12, there is nothing to limit the disqualification, or to prevent it continuing for the whole life of the candidate, is a strong argument in the defendant's favour.

MELLOR, J. I am of the same opinion. I think Rules 12 and

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six successive months from all meetings of the board, except from temporary illness or other cause to be approved by the board, or is punished with imprisonment for any crime, or is adjudged bankrupt, &c., such person shall cease to be a member of the school board, and his office shall thereupon be vacant."

14 are satisfied by allowing the disqualification to continue during the residue of the member's term of office.

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Rule discharged.

Solicitor for relator: *Peddell.*

Solicitor for defendant: *Sismey.*

[IN THE COURT OF APPEAL.]

Dec. 18.

FLEMING AND ANOTHER *v.* THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY.

Practice—Costs—Common Carriers—Action against Railway Company for Loss of Goods—County Courts Act, 1867 (30 *&* 31 *Vict. c.* 142), *s.* 5—*Supreme Court of Judicature Act,* 1873 (36 *&* 37 *Vict. c.* 66), *s.* 67.

Claim alleged that the plaintiffs caused to be delivered to the defendants, as common carriers of goods for hire, a parcel of goods to be carried from S. to D. for reward to the defendants, but that the defendants did not safely and securely carry and deliver the same, but so carelessly conducted themselves that it was lost. The defendants paid 12*l.* 3*s.* 4*d.* into court, which the plaintiffs accepted in satisfaction of their claim ;—

Held, that the action was "founded on contract" within the meaning of the County Courts Act, 1867, s. 5, and that the plaintiff was not entitled to costs.

Pontifex v. *Midland Ry. Co.* (3 Q. B. D. 23) distinguished.

THE following were the material portions of the statement of claim :—

1. The plaintiffs are wholesale hardware merchants, carrying on business in Dundee, in Scotland ; and on the 26th of May, 1876, the plaintiffs by their agents, D. Miller & Son, of Sheffield, caused to be delivered to the defendants, as common carriers of goods for hire, a parcel of goods of the plaintiffs, to be carried by the defendants from Sheffield to Dundee for reward to the defendants.

2. The defendants, as such common carriers as aforesaid, accepted the said parcel of goods, to be by them taken care of and safely and securely carried and delivered to the plaintiffs at Dundee.

3. The defendants did not take care of, and safely and securely carry and deliver to the plaintiffs the said parcel of goods, but not regarding their duty in that behalf, so carelessly and negligently conducted themselves with respect thereto that the said parcel of goods was and is wholly lost.

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The defendants paid into court the sum of 12*l.* 3*s.* 4*d.*, and gave notice thereof to the plaintiffs in the terms of Rules of the Supreme Court, Appendix B., Form 5, and the plaintiffs accepted the same in satisfaction of their claim, and gave notice thereof to the defendants in the terms of Form 6. Upon an application to a master to tax the costs of the plaintiffs, he refused to do so, on the ground that the action was "founded on contract" within the meaning of the County Courts Act, 1867 (30 & 31 Vict. c. 142, s. 5). (1) Upon appeal to Lopes, J., at chambers, the decision of the master was affirmed. Upon appeal to the Queen's Bench Division the judges (Cockburn, C.J., and Mellor, J.) held that they were bound by the decision in *Tattan* v. *Great Western Ry. Co.* (2), and ordered that the defendants should pay to the plaintiffs the costs of the action.

The defendants appealed.

June 26. *Wilberforce*, for the defendants. This is an action "founded on contract," and therefore the plaintiffs are not entitled to costs. The plaintiffs may rely upon *Tattan* v. *Great Western Ry. Co.* (2), but that case can hardly be considered a binding decision since *Baylis* v. *Lintott.* (3) The plaintiffs' ground of complaint is the breach of the contract to carry, and therefore the case is clearly distinguishable from *Pontifex* v. *Midland Ry. Co.* (4)

Maurice Powell (*H. D. Greene*, with him), for the plaintiffs. The statement of claim in effect charges a breach of duty, and therefore

(1) By the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5, "If in any action commenced after the passing of this Act in any of her Majesty's superior Courts of record the plaintiff shall recover a sum not exceeding 20*l.*, if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit, unless the judge certify on the record that there was sufficient reason for bringing such action in such superior Court, or unless the Court or a judge at chambers shall by rule or order allow such costs."

By the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 67, "The provisions contained in the 5th . . . . section of the County Courts Act, 1867, shall apply to all actions commenced or pending in the said High Court of Justice, in which any relief is sought which can be given in a county court."

(2) 2 E. & E. 844; 29 L. J. (Q.B.) 184.

(3) Law Rep. 8 C. P. 345.

(4) 3 Q. B. D. 23.

the action is plainly for a tort: *Bretherton* v. *Wood* (1); *Pozzi* v. *Shipton* (2); *Marshall* v. *York, Newcastle, and Berwick Ry. Co.* (3) Wherever goods are lost by a person who is bound to take care of them, he may be sued in tort: *Martin* v. *Great Indian Peninsular Ry. Co.* (4)

Wilberforce, in reply.

Cur. adv. vult.

Dec. 18. The judgment of the Court (Bramwell, Baggallay, and Thesiger, L.JJ.) was delivered by

BRAMWELL, L.J. This case was argued before this Court during Trinity sittings, and we then took time to consider the question raised between the parties, and we have now come to the conclusion that the decision of the Court below must be reversed; we do not differ from a clear opinion of the judges of the Queen's Bench Division, for if they had not felt themselves bound by the decision in *Tattan* v. *Great Western Ry. Co.* (5) they might have decided in favour of the defendants. The question is, whether the plaintiffs are entitled to costs in an action, in which they have recovered a sum not exceeding 20*l.*, and in which they charge the defendants as common carriers. According to *Bryant* v. *Herbert* (6) we have to determine whether the action is "founded on contract" or "on tort," and whether we are to decide this question by looking at the form of the pleadings or at the facts, it is clear that this action is "founded on contract." By paying money into court unconditionally, the defendants have admitted the truth of the allegations set forth in the statement of claim. These allegations seem in effect to amount to a charge, that in consideration of the payment of hire the defendants promised to carry safely the plaintiffs' goods; and this would clearly have been under the old forms of pleading a declaration in contract. It is unnecessary for us to determine whether *Tattan* v. *Great Western Ry. Co.* (5) was rightly decided; for it came before the Court of Queen's Bench before the passing of the County Courts Act (30 & 31 Vict. c. 142), s. 5;

(1) 3 B. & B. 54.
(2) 8 A. & E. 963.
(3) 11 C. B. 655; 21 L. J. (C.P.) 34.
(4) Law Rep. 3 Ex. 9.
(5) 2 E. & E. 844; 29 L. J. (Q.B.) 184.
(6) 3 C. P. D. 389.

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but we may say that we are not satisfied with the decision in that case. The question before us depends upon the statute which I have just mentioned. *Pontifex* v. *Midland Ry. Co.* (1) may appear at first sight in favour of the plaintiffs; but upon examination of the facts it will be found that we are not really differing from that decision. The plaintiff in that case had delivered goods to the defendants to be sent to certain persons: afterwards the plaintiff discovered that the consignees were insolvent, and he, as unpaid vendor, elected to exercise his right of stoppage in transitu; he thereupon gave notice to the defendants to re-deliver the goods to him, but they delivered them to the consignees whereby the goods became lost to the plaintiff; he had put an end to the original contract to carry and deliver, and the delivery by the defendants to the consignees was a wrongful conversion and therefore a tort: the goods came into the hands of the defendants under a contract; but after that contract had been determined, the defendants wrongfully dealt with them. It is manifest that *Pontifex* v. *Midland Ry. Co.* (1) is very distinguishable from the present case. Here the real ground of complaint was the breach of the contract to deliver. The decision of the Queen's Bench Division must be reversed.

Appeal allowed.

Solicitors for plaintiffs: *Rickards, Walker, & Maude, for E. K. Binns, Sheffield.*

Solicitors for defendants: *Cunliffe, Beaumont, & Davenport, for R. Lingard Monk, Manchester.*

(1) 3 Q. B. D. 23.

[IN THE COURT OF APPEAL.]

1878
Nov. 14.

TAYLOR *v.* BATTEN.

Practice—Discovery of Documents—Privilege—Identification—Description in Affidavit—Rules of the Supreme Court, Order XXXI., Rules 12, 13.

The plaintiff having obtained an order for the discovery of documents, the defendant, in his affidavit, objected to produce "certain documents, letters, and correspondence, which have passed between my legal advisers and myself," and "certain instructions to and opinions of counsel," which "are numbered 50 to 76 inclusive, and are tied up in a bundle marked with the letter A and initialed by me":—

Held, that the documents were sufficiently described, and that the plaintiff could not be compelled to further identify them.

ACTION upon a judgment obtained in the Royal Court of Jersey against the defendant.

The plaintiff having obtained an order for the discovery of documents under Rules of the Supreme Court Order XXXI., Rule 12, the defendant, in his affidavit, under Rule 13, objected to produce certain documents upon the ground of privilege; the defendant having, pursuant to an order, made a further affidavit, the plaintiff took out a summons to compel the defendant to make a better affidavit; at the hearing of the summons, Huddleston, B., refused to make an order, holding that the defendant's further affidavit was sufficient. The plaintiff appealed to the High Court of Justice, where the judges (Field, J., and Huddleston, B.), being divided in opinion, no order was made. The plaintiff then appealed to the Court of Appeal against the refusal of Huddleston, B., at chambers.

The other facts are sufficiently stated in the judgment of the Court.

Nov. 13. *W. H. Townsend*, for the plaintiff. The defendant ought in his affidavit to describe the documents in such a manner, that if the claim of privilege proves to be unfounded as to any of them, the plaintiff may be in a position to apply for their production: 2 Daniell's Chancery Practice, ch. xlii. p. 1679 (5th ed.); *Lazarus* v. *Mozley* (1); *Hamilton* v. *Nott.* (2) The defendant has not substantially identified the documents mentioned in his

(1) 5 Jur. (N.S.) 1119. (2) Law Rep. 16 Eq. 112, at p. 117.

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first affidavit; he ought to have stated the dates of all of them, and also the names of the writers of the letters: the plaintiff does not claim that the name of the counsel whose opinion was taken should be disclosed. Although *Fortescue* v. *Fortescue* (1) related to the discovery of documents of title as to land (2), yet it is clearly in point for the present case. At the trial the defendant may raise the defence that he had no knowledge of the proceedings taken against him in Jersey; and the plaintiff is entitled to ascertain, whether at the time of the suit in the Court of Jersey the defendant was not taking legal advice with respect to it. If the defendant had not objected to produce the documents, perhaps the description would have been sufficient.

J. C. Mathew, for the defendant. By this application the plaintiff seeks to deprive the defendant of his privilege. The first affidavit of the defendant may have been insufficient; but the further affidavit sets out all the information which he is bound to afford; it is framed upon the plaintiff's affidavit in *Minet* v *Morgan* (3), and the Court of Appeal in effect held that the affidavit was sufficient. All communications with a solicitor, and all opinions of counsel with respect to the subject-matter of the action, are privileged from discovery, whatever may be the time at which they were written: *Bolton* v. *Corporation of Liverpool.* (4)

Townsend, in reply. The decision in *Minet* v. *Morgan* (3) is not in point for the present case; the production of the documents themselves was claimed, and the question was, whether, upon the facts stated in the affidavits, they were protected from production; here the only question is, whether the documents are sufficiently described in the affidavit of the defendant. The plaintiff cannot obtain an order for a production of the documents which the defendant claims to withhold, although in the result they may prove not to be privileged: in *Phelps* v. *Olive* (5) Lord Cottenham refused to order the production of documents described as "a bundle of papers marked G."

Cur. adv. vult.

(1) 34 L. T. (N.S.) 847.

(2) See *New British Mutual Investment Company, Limited*, v. *Peed*, 3 C. P. D. 196.

(3) Law Rep. 8 Ch. 361.

(4) 1 My. & K. 88.

(5) Mentioned in note to *Inman* v. *Whitley*, 4 Beav. 549.

Nov. 14. The judgment of the Court (Bramwell, Brett, and Cotton, L.JJ.) was delivered by

COTTON, L.J. This was an appeal in a case where the Court below was equally divided. The circumstances are as follows: The plaintiff in this action called on the defendant to make an affidavit of documents in his possession. The first affidavit made by the defendant was clearly insufficient; the plaintiff applied for and obtained a further affidavit, and the question is whether that second affidavit was sufficient. The question arises as to documents, for which privilege was claimed on the ground that they consist of correspondence with the defendant's legal advisers, cases for the opinion of counsel and counsel's opinions. There is no question as to the first affidavit, it was clearly insufficient; it ran thus: "I have also in my possession or power certain documents, letters, and correspondence, which have passed between my legal advisers and myself in relation to the matters in question in this case, and with a view to my defence to the plaintiff's claim, and certain instructions to and opinions of counsel in relation to the same matters, all of which I claim to be privileged from production." This is clearly insufficient, as it only describes the documents as "certain documents, letters," &c., without any further identification. In the further affidavit, the second paragraph is as follows: "The documents referred to in paragraph 2 of my former affidavit are numbered 50 to 76 inclusive, and are tied up in a bundle marked with the letter A and initialed by me."

The plaintiff contended that this was insufficient, but, as I understand, he did not deny that it would have been sufficient, if it had referred to documents which the defendant was not unwilling to produce. In my opinion, if these documents had been merely scheduled in the ordinary way, and no objection had been made to their production, the description would have been amply sufficient for the purpose of identification. For all the Court requires, where there is no question of privilege or objection to produce the documents, is that they should be so far identified, that the Court can see that the documents referred to are produced if required.

Then let us see whether further identification is required, if

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there is an objection to produce the documents. We must remember that the plaintiff is bound to take the affidavit as true, unless it can be shewn that there is some reason on the face of it why it cannot be relied on. The affidavit is sufficient if the documents are sufficiently identified. But it is said that the plaintiffs are entitled to be put in such a position as to test the truth of the affidavit by the description of the documents. That, however, is, in our opinion, erroneous. The only object of the affidavit is to enable the Court to order the documents to be produced, if it think fit to make an order to that effect; and if words are used which, if true, protect the documents, no further particularity is necessary than in the case of documents for which protection is not claimed. If an affidavit claiming protection for documents some of which are, while others are not, privileged did not sufficiently shew which were entitled to protection, the Court would either order production of all or, as under ordinary circumstances would be the proper course, allow the party an opportunity of making a further affidavit to identify the documents entitled to protection. But here the protection claimed applied to all the classes of documents mentioned in the schedule. The case stood over, not because of any doubts we entertained on the subject, but because it was suggested that a case before Lord Cottenham was an authority against the view we have taken. Mr. Townsend has sent me that case (1), which is shortly reported in a note to a case in Mr. Beavan's Reports. It amounts to this, that the mere statement, "I have a bundle of papers marked G," is not sufficient identification. But here we have more than that. We have the papers numbered 50 to 76 in a bundle marked and initialed. He referred us to another case: *Fortescue* v. *Fortescue* (2), before Vice-Chancellor Hall. If we dissented from the decision in that case, we should not follow it. But it does not decide this point at all. The affidavit there was with regard to certain deeds, which it described merely as a bundle of deeds relating to the defendant's title, and the Vice-Chancellor held that the affidavit was not sufficient. This is within the principle of our decision. It is true that in ordering a better affidavit the Vice-Chancellor says, that the

(1) *Phelps* v. *Olive*, mentioned in note to *Inman* v. *Whitley*, 4 Beav. 549.

(2) 34 L. T. 847. 24 W.R. 945.

plaintiff is entitled to a proper discovery of the instrument which would take away his title, and that he is entitled to know whether that instrument is in the possession of the defendant, and that giving a proper schedule would shew that. If the decision was that the plaintiff was entitled to a detailed schedule shewing the nature of the defendant's title-deeds, we should not agree with it. But that was not the decision. That case, therefore, does not support the plaintiff's view. The plaintiff admits that his object in endeavouring to obtain the further affidavit is to make out some case against the defendant, by extracting from him some acknowledgment of his having been acquainted with certain proceedings in Jersey. Now, though he cannot require any further specification in the schedule of documents, yet if he has reason to believe that the defendant was in communication with a solicitor in Jersey shortly before the judgment, or can make out any other case as to his knowledge of the proceedings there, he can administer interrogatories as to those matters, so as to prevent the defendant from setting up as a defence that the judgment was recovered against him without notice. We are of opinion that the appeal fails, and that the defendant ought not to be required to make any further affidavit. The principle of our decision is that the object of the affidavit is to enable the Court to make an order for the production of the documents mentioned in it, if the Court think fit so to do, and that a description of the documents which enables production, if ordered, to be enforced, is sufficient.

Appeal dismissed.

Solicitors for plaintiff: *Hurford & Taylor.*
Solicitors for defendant: *Waltons, Bubb, & Walton.*

1878
Nov. 25.

Re THE SONGS "KATHLEEN MAVOURNEEN" AND "DERMOT ASTORE."
Ex parte HUTCHINS & ROMER.

Copyright in Music—Exclusive Right of Performance—5 & 6 Wm. 4, c. 45, ss. 2, 4, 14, 20, 22—Songs published before 5 & 6 Vict. c. 45—Right to have Entry Expunged—Person "aggrieved."

The Act 5 & 6 Vict. c. 45. ss. 4, 20, does not confer any exclusive right to the performance of musical compositions published before the passing of the Act.

Upon an application under s. 14, to expunge entries in the register at Stationers' Hall, representing A. to be the proprietor of the liberty of performing certain songs published before the Act, it appeared that the applicants, who were music-publishers, claimed under a general grant of the copyright in the songs made by the composer after the Act, and that A. claimed under a subsequent grant by the composer which purported to convey separately the right of performing them. A., under colour of this grant, had threatened to take proceedings against persons performing the songs without his consent:—

Held, that the application to expunge the entries must be granted; for although the applicants had equally with A. no exclusive right to the performance of the music, they were "aggrieved" by the existence of the entries, which were calculated to prejudicially affect their literary copyright in the songs by diminishing the number of copies sold.

MOTION on behalf of C. L. Hutchings and F. Romer, music publishers, under 5 & 6 Vict. c. 45, s. 14 (1), for an order to

(1) 5 & 6 Vict. c. 45, by s. 14 enables any person who shall deem himself aggrieved by any entry made under colour of the Act in the Book of Registry to apply by motion to the Court of Queen's Bench, &c., for an order that such entry be expunged or varied.

By s. 2 of the Act "book" shall include a sheet of music.

By s. 4, "Whereas it is just to extend the benefits of this Act to authors of books published before the passing thereof, and in which copyright still exists, Be it enacted that the copyright which at the time of the passing of the Act shall subsist in any book theretofore published shall endure for the full term provided by the Act in cases of books thereafter published, and shall be the property of the person who at the time of the Act shall be the proprietor of such copyright."

By s. 20, after reciting that it is expedient to extend to musical compositions the benefits of 3 & 4 Wm. 4, c. 15, and the present Act, it is enacted that the provisions of the said Acts shall apply to musical compositions, and that the sole liberty of representing or performing, or causing, or permitting to be represented or performed, any dramatic piece or musical composition shall endure and be the property of the author thereof, and his assigns, for the term in this Act provided for the duration of copyright in books, and the provisions hereinbefore enacted in respect of the property of such copyright and of registering the same shall apply to the liberty of repre-

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expunge two entries in the Book of Registry kept at Stationers' Hall of musical compositions entituled "Kathleen Mavourneen," and "Dermot Astore" respectively, made on the 19th of September, 1878, representing F. W. N. Crouch to be the proprietor of the liberty of representation or performance of these compositions—two entries representing Crouch as assignor, and J. F. Adams as assignee of such liberty of representation—and two entries of two consents dated the 21st of August, 1878, in respect of these compositions, representing that Crouch and Adams had consented and agreed to accept the benefits of 5 & 6 Vict. c. 45, for the extension of the term of the liberty of performance of these compositions—or for such other order in the premises as the Court should think fit.

It appeared from affidavits that the music of the above songs was composed by Crouch, then residing in England, before 5 & 6 Vict. c. 45, namely, about 1835 or 1836, the words being written by a Mrs. Crawford, and that in 1841 the copyright of the songs was registered at Stationers' Hall. By deed, made in 1843, between Crouch of the one part, and T. D'Almaine and T. G. Mackinlay of the other, after reciting that Crouch was entitled to the musical compositions in the schedule to the deed (which included the two songs above mentioned), and had agreed to sell them to D'Almaine and Mackinlay, he, for valuable consideration, assigned to them "all his present and future vested and contingent copyright in the musical compositions, and the sole and exclusive right and liberty of printing and publishing the same under 5 & 6 Vict. c. 45, and the Copyright Acts," &c. In October, 1867, and in January, 1868, the executors of Mackinlay, the surviving partner, by deeds assigned to C. L. Hutchings and F. Romer, their interest, whether copyright or otherwise, in the musical compositions, "and also of representing and performing

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senting or performing any dramatic piece or musical composition.

By s. 22: "No assignment of the copyright of any book consisting of or containing a dramatic piece or musical composition shall be holden to convey to the assignee the right of representing or performing such dramatic piece or musical composition, unless an entry in the registry book shall be made of such assignment, wherein shall be expressed the intention of the parties that such right should pass by such assignment."

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the same." In August, 1878, Crouch made an assignment to J. F. Adams of "the sole liberty of performing or singing, or causing or permitting to be performed or sung," the two musical compositions, and Adams proceeded to make the entries described in the motion, and an agent acting on his behalf afterwards claimed penalties from different persons for having performed the songs in public, without the consent of the proprietor of the right of so performing them.

F. W. Raikes, in support of the application. Messrs. D'Almaine and Mackinlay had a good title to the right of representation under the deed of 1843, which, by conveying all the copyright of Crouch in the most general terms, was equivalent to an express assignment of the right of representation, so that no entry on the register as prescribed by s. 22 was necessary to make the assignment valid: *Lacy* v. *Rhys* (1); *Marsh* v. *Conquest* (2); *Cumberland* v. *Planché*. (3) This grant of the right of dramatic representation cannot be affected by an attempt to grant the same right separately in derogation of the earlier grant. The entries made by Adams are primâ facie evidence of title, and ought to be expunged, for they are calculated to injure the applicants in the way of their trade as music publishers, by deterring people from purchasing copies of the songs.

C. H. Turner, for the defendant. Upon the true construction of the deed it conveys only the literary copyright in the music to D'Almaine and Mackinlay, leaving the grantor at liberty to dispose of the right of representation as he subsequently did.

[COCKBURN, C.J. Was there ever any exclusive right of representing these compositions under 5 & 6 Vict. c. 45? Sect. 4, which extends the benefit of the Act to books published before the Act (books by s. 2, including "music") makes it an express condition that they should be books in which "copyright still subsists." Now before the Act there was no exclusive right of performing these songs.]

Sect. 2 makes the word "book" include musical compositions,

(1) 4 B. & S. 873; 33 L. J. (Q.B.) 157. *10 Jur. N.S. 612*

(2) 17 C. B. (N.S.) 418; 33 L. J. (C.P.) 319. *10 Jur. N.S. 989.*

(3) 1 Ad. & E. 580.

and then s. 4 extends the benefits of the Act, including, of course, those contained in s. 20, as to rights of performance or representation, to books published before the Act. Music published before the Act is, therefore, as regards the right of performance, on the same footing as music published after the Act, and by s. 22 a general assignment of copyright does not include the right of performance, so that the composer was at liberty to assign it to a third person.

[COCKBURN, C.J.:—Did a general assignment before the Act of the copyright in a musical work convey the right of representation? If not, the Act does not operate retrospectively so as to create the right.]

If neither party is entitled to the right of representation the applicants are not aggrieved by the entries in question, and have no right to ask to have them expunged. To enable them to make such an application they must give affirmative proof of their own title, and not merely shew that the defendant has no right to the copyright: *Ex parte Davidson* (1); *Ex parte Davidson* (2); *Graves's Case.* (3)

COCKBURN, C.J. I think that this application must be granted. Two questions have to be decided, first, whether the person who made the entries at Stationers' Hall, which are now sought to be expunged, was entitled to the exclusive right of representation of the two songs, and, secondly, if this question be decided against him, whether the applicants are parties aggrieved within the meaning of the Act? With regard to the first point, I think it was not competent for Mr. Adams to cause these entries to be made, inasmuch as he had no exclusive right to the representation of these songs. At the time of the passing of 5 & 6 Vict. c. 45, a copyright had been created by earlier statutes giving the exclusive right of printing or publishing a sheet of music. This copyright conferred no exclusive right to the performance of such music in public, and there was nothing to prevent any man who bought the music in a shop from having it sung in public. The protection against the exercise of such a liberty by the public

(1) 2 E. & B. 577. (2) 18 C. B. 297; 25 L. J. (C.P.) 237. (3) Law Rep. 4 Q. B. 715.

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is entirely the creature of the Act 5 & 6 Vict. c. 45, but there is nothing in that Act to shew that the provision as to the right of representation or performance was intended to have a retrospective operation. In the present case the songs were published to the world before anything happened which could confer an exclusive right of representing them upon any one. The right of representation had in fact been given to the public, and the statute did not take it back from them and give it to the composer or his assigns. Mr. Adams had therefore no right to make entries which are founded upon a supposed right to the representation of the songs.

Then arises the question, are the applicants aggrieved by these entries and entitled to have them expunged? I think they are. I agree that where there is any question of title between the parties, the Court ought not to exercise this summary jurisdiction in the manner claimed. But where there is no such question between them, and one of them can shew a substantial grievance, the case is different. Here, it appears that prior to the Act, there was a copyright in the printing and publishing of the songs treated as books, and the value of this copyright which still continues, of course depends on the numbers of copies of the music which the owner of the copyright can induce the public to purchase. To place any restraint on the performance of the songs in public, as Mr. Adams is shewn to have done, will lessen the number of copies sold, and this is a grievance on the part of the applicants which the Court can and ought to prevent.

I think, therefore that on this ground, we must order the entries to be expunged.

MELLOR, J., concurred.

Solicitor for applicants: *H. S. Russell.*

Solicitors for defendant: *Walter Jarvis & Triscott.*

BOWEY *v.* BELL.
BROOKS *v.* ISRAEL.
NORTH *v.* BILTON.
SIDDONS *v.* LAWRENCE.

1878
Dec. 21.

Practice—Verdict for a Farthing Damages in Actions for Slander—No Application for Costs at Trial—Subsequent Application to Divisional Court—Time for making Application—Judicature Act, 1875, *Order LV.—Appellate Jurisdiction Act,* 1876, *s.* 17, *Order LVII.,* 1876.

Where in an action tried by a jury the plaintiff recovers a farthing damages, and no application or order as to costs is made at the trial, the Divisional Court has jurisdiction under Order LV. to entertain an application to deprive the plaintiff of costs.

Such application will only be entertained when it is made within a reasonable time after the trial.

4 Ex D 178
4 C P D 433.

THESE were applications to deprive the plaintiffs of costs in actions tried before a jury where there had been a verdict for one farthing damages only.

July 1; Dec. 2. The following were the counsel in the different actions:—

In *Bowey* v. *Bell—Herschell, Q.C.,* and *J. Edge,* for plaintiff; *Littler, Q.C.,* and *Petheram,* for defendant.

In *Brooks* v. *Israel—Wightman Wood,* for plaintiff; *Crispe,* for defendant.

In *North* v. *Bilton—Lawrance, Q.C.,* and *J. H. Etherington Smith,* for plaintiff; *Horace Smith,* for defendant.

In *Siddons* v. *Lawrence—J. H. Etherington Smith,* for plaintiff; *C. A. Cripps,* for defendant.

The facts and arguments appear in the judgments.

Cur adv. vult.

Dec. 21. The judgments of the Court (Mellor and Manisty, JJ., and Pollock, B.) were delivered by

MANISTY, J.:—

BOWEY *v.* BELL.

BOWEY *v.* BELL.

This was an action for slander, which came on for trial before Lord Justice Bramwell and a jury, on the 25th of March, 1876;

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when a verdict was found for the plaintiff with damages one farthing. Judgment was given for the plaintiff on the same day.

No application was made to the learned judge by either party with respect to costs, and no further proceeding was taken in the action till the 20th of March, 1877.

On the 30th of January, 1877, the Common Pleas Division of the High Court of Justice decided in the case of *Parsons* v. *Tinling* (1) (which was an action for libel) that Order LV. in Schedule I. of the Judicature Act, 1875, repealed the previous law as to costs in an action for slander, and entitled the plaintiff to the costs of the action notwithstanding the nominal amount of his damages, unless upon application made at the trial for good cause shewn the judge before whom the action was tried, or the Court, should otherwise order.

In consequence of that decision the plaintiff Bowey, on the 20th of March, 1877, entered up judgment and proceeded to tax his costs.

The master taxed his costs at one farthing, and the plaintiff took out a summons to have the taxation reviewed. That summons was referred to the Court by Field, J., and it came on for hearing in the Queen's Bench Division on the 30th of May, 1877, when the Court ordered the taxation to be reviewed. (2) The defendant appealed against that decision.

On the 2nd of June, 1877, the Court of Appeal, by a majority of two judges out of three, decided (in the case of *Garnett* v. *Bradley* (3) which was an action for slander in the Exchequer Division), that the statute 21 Jac. 1, c. 16, s. 6, *was not* repealed by Order LV., and that consequently the plaintiff was only entitled to one farthing for costs.

On the 13th of June, 1877, the Court of Appeal, upon the authority of *Garnett* v. *Bradley* (3), reversed the decision of the Queen's Bench Division made in the present action on the 30th of May, 1877. (4)

On the 6th of June, 1878, the House of Lords (5), reversed the decision of the Court of Appeal in *Garnett* v. *Bradley* (3), and

(1) 2 C. P. D. 119.
(2) 36 L. T. (N.S.) 550.
(3) 2 Ex. D. 349.
(4) 36 L. T. (N.S.) 640.
(5) 3 App. Cas. 944.

decided that, in the absence of any order to the contrary made by the judge at the trial or by the Court, the costs follow the event in all cases where an action of slander or libel, or any case not triable in a county court, is tried by a jury.

On the 20th of June, 1878, the Court of Appeal gave the present plaintiff (Bowey) leave to appeal to the House of Lords against their decision of the 13th of June, 1877, and that appeal is pending.

On the 27th of July, 1878, the defendant Bell gave notice that this Court would be moved on Thursday, the 1st of August next, or so soon after as counsel could be heard, for an order that the costs of this action should not follow the event, but that the plaintiff should pay the costs of the action, or that each party should pay his own costs.

That motion came on to be heard before my Brothers Mellor and Pollock, and myself, on the 2nd of December, 1878.

The questions we have to decide are, first, whether having regard to the fact that no application or order as to costs was made at the trial this Court has jurisdiction to make any such order as is now asked for by the defendant. Secondly, whether, assuming this Court to have such jurisdiction, it ought to exercise it, having regard to the time which has elapsed since the trial and the decisions which have been given, and the proceedings which have taken place in the meantime.

As to the first question, we are of opinion that this Court has power to entertain the present application, notwithstanding no application was made to, and no order as to the costs was made by, the judge at the trial. It is unnecessary to decide whether if the judge at the trial had made an order as to the costs under Order LV. this Court could have reviewed his decision, unless he gave leave to appeal (see s. 49 of the Judicature Act, 1873), but in the absence of any such order we think it is competent to either party to apply to this Court (under Order LV.) to make such order as it may think fit, as to the costs of the action: see *Baker* v. *Oakes* (1); *General Steam Navigation Co.* v. *London and Edinburgh Shipping Co.* (2)

As to the second question, we are of opinion that this Court ought not now to interfere.

(1) 2 Q. B. D. 171. (2) 2 Ex. D. 467.

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At the time when this action was tried (viz. in March, 1876), there was a very general impression that a plaintiff, recovering one farthing damages in an action for slander, could recover only one farthing for his costs, by virtue of the statute 21 Jac. 1, c. 16, s. 6, and all parties seem to have acted for a considerable time upon the notion that such was the law.

But it must be borne in mind that from the 30th of January, 1877, when the Common Pleas Division decided that a plaintiff, who recovers a farthing damages in an action of libel or slander tried by a jury, is entitled to his costs, unless an order to the contrary is made at the trial by the judge who tries the cause or by the Court, down to the 2nd of June, 1877, when the Court of Appeal in *Garnett* v. *Bradley* (1) overruled that decision, no application was made by the defendant to deprive the plaintiff of his costs, and that it was not until after the House of Lords, on the 6th of June, 1878, in the case of *Garnett* v. *Bradley* (2) declared the law to be as laid down in *Parsons* v. *Tinling* (3), and after the plaintiff had obtained leave to appeal to the House of Lords in this case, that the present application was made.

Under these circumstances we are of opinion that the application is too late, and ought not to be entertained. The motion will therefore be dismissed with costs.

BROOKS v. ISRAEL.

BROOKS v. ISRAEL.

This was an action for slander tried before Mr. Justice Lopes and a jury on the 13th and 14th of February, 1878, when the jury found a verdict for the plaintiff with one farthing damages.

No application was made at the trial as to the costs.

No further proceeding was taken by either party until after the House of Lords, on the 6th of June, 1878, decided in the case of *Garnett* v. *Bradley* (2) that in the absence of any order to the contrary a verdict for one farthing damages in an action of slander carries costs

On the 18th of June, 1878, the plaintiff gave notice of taxation of his costs, which were taxed on the 26th at 11*l.*

(1) 2 Ex. 349. (2) 3 App. Cas. 944.
(3) 2 C. P. D. 119.

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BROOKS v. ISRAEL.

On the 24th of June, at the instance of the defendant, Mr. Justice Lopes stayed the proceedings to give the defendant the opportunity of applying under Order LV., Judicature Act, 1875, for an order depriving the plaintiff of his costs.

On the 26th of June the defendant gave notice of motion to that effect, and the same came on for hearing before my Brothers Mellor, Pollock, and myself, on the 2nd of December.

It was objected on the part of the plaintiff that this Court could not entertain the application for several reasons: first, because no application was made at the trial to the learned judge who tried the cause; secondly, because the application was too late; thirdly, because Order LV., Judicature Act, 1875, has been repealed by s. 17 of the Appellate Jurisdiction Act, 1876, and Rule 9 of Order LVII. a, 1876.

First: We are of opinion, and have already so decided in *Bowey* v. *Bell*, that this Court can entertain the present application notwithstanding no application was made to the judge at the trial.

Secondly: We think that under the circumstances of this case the application is not too late.

Third: We are of opinion that Order LV. has not been repealed. We think it never could have been intended to substitute another single judge for the judge who presided at the trial, and there is nothing in the language of the 17th section of the Act or of the Rule 9, Order LVII. a, which expressly or by implication repeals Order LV.

The case must consequently stand for further consideration on the merits.

NORTH *v.* BILTON.

NORTH v. BILTON.

This was an action for slander which was tried before Cleasby, B., with a jury, on the 2nd of April, 1878, when a verdict was found for the plaintiff with one farthing damages.

The plaintiff applied to the learned judge at the trial to certify for his costs, but the judge refused.

No application was made by the defendant under Order LV., Judicature Act, 1875.

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NORTH v. BILTON.

No further proceeding was taken by either party until after the decision of the House of Lords on the 6th of June, 1878, in *Garnett* v. *Bradley*. (1)

On the 20th of June, 1878, the plaintiff gave notice to tax his costs, and they were taxed on the 21st at 80*l*. 3*s*. 2*d*.

On the 27th of June the defendant gave notice of his intention to apply to this Court for an order depriving the plaintiff of his costs.

That motion came on to be heard before my Brother Mellor and myself on the 1st of July, and again before my Brothers Mellor, Pollock, and myself, on the 2nd of December, when it was objected that this Court had no power to entertain the application, and that the application was too late.

We are of opinion that the Court has the power to entertain the application, and that it is not too late.

The case will therefore stand for further consideration on the merits.

SIDDONS v. LAWRENCE.

SIDDONS v. LAWRENCE.

This was an action for a malicious prosecution tried before Cleasby, B., with a jury, at Oakham, on the 19th of March, 1878, when a verdict was found for the plaintiff, with one farthing damages.

The plaintiff applied for a certificate to entitle him to costs, which the learned judge refused to grant.

No application as to the costs was made by the defendant.

No further proceeding was taken by either party until after the decision by the House of Lords in the case of *Garnett* v. *Bradley* (1), on the 6th of June.

On the 22nd of June, the plaintiff delivered his bill of costs for taxation, which was adjourned to enable the defendant to consult counsel.

On the 3rd of July the plaintiff's costs were taxed at 67*l*. 19*s*. 2*d*.

On the 6th of July a summons was taken out before Cleasby, B., to stay execution, which was heard before Lindley, J., in the absence of Cleasby, B., on circuit, on the 23rd of July, when

(1) 3 App. Cas. 944.

the learned judge stayed execution for twenty-eight days, the defendant undertaking to apply within fourteen days for an order to deprive the plaintiff of costs.

On the 23rd of July the defendant, in pursuance of that undertaking, gave notice of motion for an order under Order LV. of the Judicature Act, 1875, that the plaintiff should bear and pay his own costs of the action.

That motion came on to be heard before my Brothers Mellor and Pollock and myself on the 2nd of December, when it was objected that the Court had no power to entertain the application, and that the application was too late.

We are of opinion that neither of these objections can be sustained; therefore the case will stand for further consideration on the merits.

Judgment accordingly.

Solicitors:—

In *Bowey* v. *Bell:*

Shum & Crossman, for plaintiff.

Oliver & Botterill, for defendant.

In *Brooks* v. *Israel:*

L. T. Robinson, for plaintiff.

Humphreys & Son, for defendant.

In *North* v. *Bilton:*

R. W. Marsland, for plaintiff.

Hardisty & Rhodes, for defendant.

In *Siddons* v. *Lawrence:*

Beaumont & Warren, for plaintiff.

~~*Humphreys & Son*~~, for defendant.

1879
Jan. 14.

FINNEY *v.* HINDE.

Practice—Charging Order under 1 & 2 *Vict. c.* 110, *ss.* 14, 15—*Judicature Act,* 1875, *Order L.—Death of Judgment Debtor—Power to continue Proceedings.*

An order charging stock under 1 & 2 Vict. c. 110, ss. 14, 15, cannot be made absolute where it appears that the judgment debtor was dead when the order nisi was obtained.

MOTION by way of appeal against an order of Field, J., at chambers, making absolute an order nisi under 1 & 2 Vict. c. 110 (1), to charge certain stock standing in the name of J. C. Hinde, against whom the plaintiff had obtained judgment.

The facts upon the affidavits were that cause was shewn against the order on the 14th of December, 1878, when it appeared that the judgment debtor was dead at the time when the order nisi was obtained, and that cause was shewn on behalf of his widow, who was named executrix in his will, but that a caveat had been entered against proof of the will. It was objected that, as in the case of an ordinary execution by fieri facias, it would be necessary upon the death of the judgment debtor, in order to obtain execution, to apply for leave to enter a suggestion on the roll according to the Common Law Procedure Act, 1852, s. 129, a charging order could not be made absolute until such a suggestion had been entered in the action, or until the plaintiff had applied under Order XLII., rule 19, for leave to issue execution against the defendant's representative. The learned judge thought that as

(1) By 1 & 2 Vict. c. 110, s. 14: "If any person against whom any judgment shall have been entered up in any of her Majesty's superior Courts at Westminster shall have any Government stock, funds, &c., standing in his name or his own right, it shall be lawful for a judge, upon the application of any judgment creditor, to order that such stock, &c., shall stand charged with the payment of the amount for which judgment shall have been so recovered."

By s. 15: "Every order of a judge charging any Government stock, &c., under this Act shall be made in the first instance ex parte and without any notice to the judgment debtor, and shall be an order to shew cause only—and unless the judgment debtor shall within a time to be mentioned in such order shew to a judge sufficient cause to the contrary the said order shall, after proof of notice thereof to the judgment debtor, his attorney, or agent, be made absolute."

the defendant's representative had appeared to shew cause, it was unnecessary to apply for leave to proceed against her, and made the order absolute.

Anstie, for the executrix. The Act 1 & 2 Vict. c. 110, ss. 14, 15, gave no power to make the order appealed against. The charging order is to be made absolute "unless the judgment debtor" shew cause to the contrary and after proof of notice of the order nisi to the "judgment debtor." There is no mention of executors or representatives of the judgment debtor. The debtor being dead, it became impossible that the requisite conditions should be fulfilled.

Wyatt Hart, in support of the order. Cause was shewn at chambers on behalf of the executrix, and the real question was whether her title should prevail against that of the judgment creditor. In *Stuart* v. *Cockerell* (1), a fund in Court had been assigned, and the assignee obtained a stop order after the bankruptcy of the assignor. It was held, upon petition by the assignee, that he was entitled to the fund in priority to the assignee in bankruptcy. *Haly* v. *Barry* (2) is a case where a charging order under the Act was obtained after the death of the judgment debtor, and although in that case a suggestion of his death was entered on the record, it was unnecessary here, as the representative appeared, and the judge had power under Order L. to allow the proceedings to go on as between the judgment creditor and the executrix.

COCKBURN, C.J. I think this order cannot stand. The Act 1 & 2 Vict. c. 110, was passed for the abolition of arrest on mesne process, and also to introduce further provisions for facilitating the execution of judgments. It would be intended that these remedies should be co-extensive with that which they replaced, and the power of arrest was of course co-extensive with the life of the debtor. In the present case the judgment debtor was dead when the order nisi was obtained, and inasmuch as the section only allows the judge to make the order absolute after hearing what the judgment debtor has to say against it, there was a fatal

(1) Law Rep. 8 Eq. 607. (2) Law Rep. 3 Ch. 452.

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FINNEY v. HINDE.

obstacle to the further progress of the order. Order L. has no application to such an order as the present; it is a provision to prevent an action from abating by reason of a change of the parties.

POLLOCK, B. I am of the same opinion. Sections 14 and 15 enable a charging order to be made ex parte; and this order is to be made absolute unless the judgment debtor shews sufficient cause to the contrary. It is quite clear that what is meant is that the judgment debtor shall himself shew cause. If the order could be made absolute after his death it would almost always be made absolute without the inquiry contemplated by the Act. As to the argument that as the representative appeared the case ought to go on, the answer is that the charging order is not a step in an action but a new and substantive proceeding in the nature of an execution.

Order rescinded.

Solicitor for plaintiff: *James E. Dunn.*

Solicitors for executrix: *White & Sons, for Brittain, Press, & Inskip.*

1878
Dec. 2.

[IN THE COURT OF APPEAL.]

COVERDALE *v.* CHARLTON.

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 149—*Urban Authority, Streets to vest in—Street, Soil of—Possession, when sufficient to maintain Action against Wrong-doer.*

By an award made under an Inclosure Act, passed in 1766, two private roads, E. and H., were set out. About 1818, the road E. became a public highway. Down to 1863, the surveyors of highways for the parish of C., within which E. and H. were situate, had from time to time let the pasturage upon E. and H. to various persons. A local board was formed in 1863 for the parish of C., who in 1876 let the pasturage upon E. and H. to the plaintiff. He thereupon commenced to depasture the herbage with his cattle on the roads. The defendant interfered with the plaintiff's enjoyment of the pasturage.

By 38 & 39 Vict. c. 55, s. 4, a street includes any highway. By s. 144 every local board are within their districts surveyors of highways. By s. 149, all streets shall vest in and be under the control of the local board:—

Held, affirming the judgment of the Queen's Bench Division, that by force of the above enactment the property in the soil of E., being a "street," so far vested

in the local board that they could demise the right of pasturage thereon to the plaintiff, who was entitled to maintain an action:

Held, also, that the local board having no power to demise H., being a private way, the plaintiff had not sufficient exclusive possession as occupier to enable him to maintain an action.

1878

COVERDALE v. CHARLTON.

APPEAL of the defendant from the judgment of the Queen's Bench Division in favour of the plaintiff so far as relates to Endyke Lane, and cross appeal of the plaintiff from the same judgment so far as relates to Cold Harbour Lane.

Case stated after issue joined. (1)

1. In the year 1766 an Act was passed for dividing, inclosing, and draining certain lands, grounds, and common pastures in the parish of Cottingham in the East Riding of the county of York. The Act is a public Act.

2. The commissioners appointed under the Act made their award on the 24th of August, 1771, and thereby set out and appointed certain public and private roads within the parish, including Endyke and Cold Harbour Lanes.

3. Endyke Lane was set out by the award as a private road in the following terms:—

"We do order, direct, determine, and award, that there shall at all times for ever hereafter be another private way or road as and where the same is staked, ditched, or bounded out, of the breadth of thirty feet, for the use of the proprietors whose allotments adjoin upon the same, their tenants, lessees, heirs, and assigns, their servants, horses, cattle, carts, and carriages only, leading from the turnpike road of the town of Kingston-upon-Hull and Beverley westward, into and over the south side of lands in the New Ings, herein severally awarded the said F. Riley and S. Knipe, to and for them awarded by the said P. B. Whiting, &c."

Since the year 1818 Endyke Lane has been a public road, and as such it has since that date been repaired by the parish.

4. Cold Harbour Lane, which in the award was described as the North Carr Road, was set out thereby as a private road in the following terms:

"And we do order, direct, determine, and award, that there shall at all times for ever hereafter be a private way or road as and

(1) 3 Q. B. D. 376.

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where the same is now staked, ditched or bounded out, of the breadth of forty feet, for the use of the several owners of lands and grounds in Cottingham, their tenants, lessees, heirs, and assigns, and their servants, horses, carts, and carriages only, and to be called the North Carr Road, leading to and from the Dunswell Road eastward into and over lands in the Inn Common and North Carr to and from the turnpike road leading from the town of Kingston-upon-Hull to Beverley."

Cold Harbour Lane has continued since the date of the award, and still is, a private road.

5. The commissioners by their award also awarded as follows:

"And we do order, direct, and award, that no person or persons shall at any time hereafter turn any horses or other cattle into such of the public or private roads as are herein directed to be fenced on each side thereof for the space of five years from the date hereof, and from and after the expiration of the five years we do award the herbage of the roads to the surveyors of highways for the township of Cottingham; that the profits arising therefrom shall be applied towards the repairing of the roads, and we do order and direct that upon all public and private roads the owners of lands adjoining and lying open to the same (where the fences are not awarded to be made to lane off the ways), shall respectively have the herbage and benefit thereof so as they do not injure the quickwood adjoining."

6. Cottingham, whether strictly the area of a parish or a township, is and always has been, for the purpose of maintaining its highways, a distinct and separate area, which is hereinafter called the parish of Cottingham.

7. It is conceded, both by the plaintiff and the defendant, that the commissioners had no power under the Act of awarding the herbage of any of the roads thereby set out to the surveyors, and that the award so far as it purported to do so was invalid.

8. Always down to the year 1863, so far back as the memory of living witnesses extends, the surveyors of highways for the parish of Cottingham, and from the year 1863 down to the commencement of this suit, the local board for the district of Cottingham to whom the office of surveyors of highways was then transferred, have

in every year agreed with various persons for the letting to them between the months of April or May and November, of certain rights of herbage or pasturage in and about the sides of certain roads within the parish, including Endyke and Cold Harbour Lanes, and continuously since the year 1831 down to the commencement of this action, money payments have in each year been received by the surveyors from time to time, and afterwards by the local board in respect of the agreements, and applied to the repairs of roads within the parish, and save as hereinafter mentioned the persons with whom such agreements have been made have had the enjoyment of the herbage under the agreements.

9. The entire length of the roads in respect of which such agreements have been made is about eighteen miles.

10. In every such agreement which the local board have made since the beginning of the year 1866, they have allotted specific roads or parts of roads to particular individuals. Before 1866 the mode of letting had not been uniform, the method now usual having been sometimes adopted, while at other times the letting was by "gates," the takers of "gates" being allowed by their agreements to depasture cattle throughout all the roads comprised in such agreements, at a specified charge for each animal, according to its description.

11. For thirty years and upwards before the commencement of this action, different persons living in the neighbourhood had from time to time during the period when the alleged right of herbage was let, put horses or other cattle, generally in small numbers, into the roads (including Endyke and Cold Harbour Lanes) to eat the herbage therein, without taking any gates or making any agreement with the surveyors or local board. Some of these persons, on payment being demanded from them, have refused it, and have persisted in taking the herbage without payment after such refusal. Since 1863, when the local board came into existence, the number of persons taking the herbage without payment has increased, and many of them have refused to pay when payment was demanded. From 1863 till about five years before the commencement of this action, the number of persons who took the herbage without payment averaged twenty or there-

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abouts in each year, but this number has somewhat diminished during the last five years.

12. It was from time to time brought to the knowledge of the surveyors and local board that there were persons who, during the period that the alleged right of herbage was let, were depasturing the herbage with their cattle without payment, and the surveyors from time to time, and the local board during the whole time it has existed, have employed a person called a pinder, with instructions to impound any cattle that were found in or about the sides of the roads insufficiently attended, but beyond this they have not interfered, except by such proceedings before magistrates as are hereinafter mentioned.

13. Proceedings have from time to time been taken before the East Riding magistrates in petty sessions by the surveyors and local board respectively, and by the lessees of the alleged right of herbage, under the provisions of the Highway Acts from time to time in force, viz., 5 & 6 Wm. 4, c. 50, s. 74, and 27 & 28 Vict. c. 101, s. 25, but the magistrates have in such cases uniformly dismissed the proceedings, whenever it appeared that the cattle were under the control of an attendant.

14. The plaintiff, to whom before 1876 the alleged right of herbage in certain of the roads had been several times let (but not from 1871 to 1875 inclusively), had from time to time warned off those whom he found taking the herbage without his permission in the roads assigned to him, and they had desisted from openly taking the herbage there without his permission, but except as herein and in the last two paragraphs mentioned, it did not appear that there had been any interference with those who were from time to time depasturing the herbage of the roads without any payment.

15. On the 19th of April, 1876, the local board entered into an agreement in writing with the plaintiff, under which the local board agreed to let to the plaintiff the right of herbage or pasturage for cattle, except sheep, in and about the sides of the roads hereinafter mentioned, from the day of the date of the agreement until the 23rd of November then next, at the rent of 8*l.* 10*s.* Such roads were described as follows in the schedule to the agreement: From Gibsons to Railway Gate, North Moor Lane, 5*l.*;

Cold Harbour and Middle Dykes to Railway Gates, 2*l.* 5*s.*; Little North Carr Lane and Endyke Lane, 1*l.* 5*s.*

16. The day after the execution of the agreement the plaintiff commenced depasturing the herbage with his cattle in the roads that had been assigned to him under the agreement, and thenceforth until the commencement of this action he regularly continued to do so.

17. On the 25th of April, 1876, three horses and eight head of other cattle belonging to the defendant were turned into Endyke Lane aforesaid under care of the defendant's servant, and grazed there upon the sides of the road, and on the following day horses and other cattle of the defendant to about the same number were turned into Cold Harbour Lane under the care of the same servant, and grazed there upon the sides of the roads.

18. The defendant knew that the alleged right of herbage in and about the sides of the road had been let by the local board to the plaintiff, but refused to remove his cattle or to discontinue turning them out to graze upon the sides of the roads. No actual obstruction of the plaintiff's cattle was caused on either day on which the alleged trespass took place by the acts referred to in paragraph 17.

19. The defendant had himself in the year 1875 been a lessee under the local board of the alleged right of herbage in certain of the roads, but not in any of those let in 1876 to the plaintiff, and the defendant had refused to pay the local board for the right of herbage so let to him, upon the ground that other persons had depastured such herbage without his permission. Save under such letting it did not appear that the defendant had ever before the 25th of April, 1876, put any of his horses or other cattle to graze in any of the roads.

It has been agreed between the plaintiff and defendant that if the judgment of the Court be for the plaintiff the amount of the damages is to be one shilling.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover damages against the defendant, for his infringement of the plaintiff's right to the herbage or pasturage in and about the sides of the two aforesaid lanes, and for trespass to the herbage and pasturage.

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The Queen's Bench Division decided, first, that Endyke Lane was a street by virtue of s. 4 of the Public Health Act, 1875, and by virtue of s. 149 vested in the local board, and that the plaintiff was entitled to maintain the action; secondly, that the plaintiff had not such exclusive and actual possession of the whole of Cold Harbour Lane as to entitle him to maintain an action.

Nov. 30. *Cave, Q.C.*, and *Cyril Dodd*, for the defendant. (1) The plaintiff cannot maintain this action as to Endyke Lane. It must be admitted that by force of s. 4 (2) of the Public Health Act, 1875, Endyke Lane is a street within s. 149; the question is as to the meaning of the word "vest" in the latter section. If the contention on the other side prevails, the soil is arbitrarily taken from the owners and vested in the urban authority. This construction is too large, the word must be limited in some sense; otherwise cellars under the street and buildings on the street would become the property of the local board. "Vest" means gives to the local board such rights over the streets as existed for the benefit of the public before the Public Health Acts were passed; it gives them power to deal with the streets for public purposes without making compensation to the owner of the soil. They may raise and lower the streets and alter the surface, and so forth. No doubt

(1) The learned counsel in the first instance confined their argument to *Endyke Lane*.

(2) By 38 & 39 Vict. c. 55, s. 4, a street includes any highway.

By s. 144, every urban authority is made surveyor of highways.

By s. 149, all streets being, or which at any time become, highways repairable by the inhabitants at large within any urban district, and the pavements, stones, and other materials thereof, and all building implements and other things provided for the purposes thereof, shall vest in and be under the control of the urban authority.

The urban authority shall from time to time cause all such streets to be levelled, paved, metalled, flagged, channelled, altered and repaired as occasion may require; they may from time to time cause the soil of such street to be raised, lowered, or altered as they may think fit, and may place and keep in repair fences and posts for the safety of foot passengers.

Any person who without the consent of the urban authority wilfully displaces or takes up, or who injures the pavement, stones, materials, fences, or posts of, or the trees in any such street, shall be liable to a penalty not exceeding 5*l.* and to a further penalty not exceeding 5*s.* for every square foot of pavement, stones, or other material so displaced, taken up, or injured; he shall also be liable in the case of any injury to trees to pay to the local authority such amount of compensation as the Court may award.

a difficulty is created by the conjunctive words "and be under the control of," but "vest" can have a larger signification here than "be under the control of," without giving the soil to the local board: it means vest the right of passage: if the highway were obstructed, formerly the only remedy would have been by indictment, but the right of passage and the property in the street being vested in the local board it gives them a right to a civil remedy by action or injunction. It was never intended that the local board should have such a property in the soil of the street as would enable them to make a profit. If they let the pasturage the money they would receive would be applied in aid of the rates; they have no authority to take something from the owner and put it into the pockets of the ratepayers. As the soil in the highway formed part of the commonable land the property in it remains in the lord of the manor, the presumption in favour of the adjoining owner being rebutted: *Beckett* v. *Corporation of Leeds* (1). And the owner of the soil, whoever he may be, upon a dedication of a highway "parts with no other right than a right of passage to the public over the lands as dedicated, and may exercise all other rights of ownership not inconsistent therewith:" *St. Mary, Newington* v. *Jacobs* (2); *Lade* v. *Shepherd* (3). The mere control of the highway does not transfer the ownership of the soil: *Marquis of Salisbury* v. *Great Northern Ry. Co.* (4). It may be that the soil is vested in the local board so as to make them liable for any neglect in repairing it: *White* v. *Hindley Local Board* (5); but it by no means follows that the beneficial ownership of the soil is conferred upon them. The soil and the pasturage thereon are not transferred to the local board, and as the plaintiff claims through them, and can have no greater rights, he cannot maintain this action with regard to Endyke Lane.

A. Wills, Q.C., and *Wilberforce*, for the plaintiff. The plaintiff is entitled to maintain this action in respect of both lanes. With regard to any hardship there may be in taking the soil from its owner and vesting it in the urban authority, which under s. 6 is the local board, that was a matter for consideration when the local

(1) Law Rep. 7 Ch. 421.
(2) Law Rep. 7 Q. B. 47, at p. 53.
(3) 2 Str. 1004.
(4) 5 C. B. (N.S.) 174; 28 L. J. (C.P.) 40.
(5) Law Rep. 10 Q. B. 219.

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district was formed, and the owner of the land must balance the convenience and inconvenience of having an urban authority established in his district. The case of *St. Mary, Newington* v. *Jacobs* (1) only shews that a local authority having the control of a highway cannot prevent an adjoining owner from communicating with the highway in such manner as he thinks fit. *White* v. *Hindley Local Board* (2) is an authority in favour of the plaintiff as to the meaning of the word "vest;" it shews that the ownership by force of the word "vest" is transferred to the local board. The legislature, by s. 149, meant to give to the local board some property in the soil, for the words are, "vest and be under the control of." "Vest," therefore, must mean something other than "be under the control of." Something more than the mere surface of the street is to be given to them; the local board certainly have proprietary rights in the trees; the section treats them as belonging to the local board, for if they be injured they are to receive compensation. The local board must, therefore, have some ownership in them; that right of ownership can only arise from something that is given to them. So with regard to the street, it is vested in the local board—that is, the soil is vested—and they have a control over it. In *Taylor* v. *Corporation of Oldham* (3), by the Oldham Borough Improvement Act, 1865, several Acts, and amongst them certain provisions of the Public Health Act, 1848, affecting the improvement of the borough were reduced into one Act, and by s. 59 all the sewers and drains were vested in the corporation; it was decided that the clause vesting the sewers conferred an absolute property in that part of the subsoil occupied by any sewer, and not merely an easement or right of sewerage. By the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 27, the legislature have limited the extent to which the soil of the street shall vest, by enacting that the minerals shall not vest in the sanitary authority.

As to Cold Harbour Lane, it is admitted that it not being a highway, and therefore not a street, the local board had no power to let the pasturage. The plaintiff, however, claims a right to the pasturage arising from his possession; he has a sufficient

(1) Law Rep. 7 Q. B. 47. (2) Law Rep. 10 Q. B. 219.
(3) 4 Ch. D. 396.

possessory enjoyment to entitle him to maintain the action. Very slight enjoyment is enough, and he has possession by his cattle in the only way that he can have possession. The right of bringing an action founded on a right of possession is well recognised. The cases shew what manner of possession is sufficient to enable a person to bring an action. In Co. Lit. 4 b., it is said, "If a man hath twenty acres of land, and by deed granteth to another and his heirs vesturam terræ, and maketh livery of seisin, &c., the land itself shall not pass, because he hath a particular right in the land; for thereby he shall not have the houses, timber trees, mines, and other real things, parcel of the inheritance, but he shall have the vesture of the land—that is, the corne, grass, underwood, swepage, and the like, and he shall have an action of trespass quare clausum fregit. The same law if a man grant herbagium terræ." And it is laid down in the judgment of the Court in *Earl of Rutland* v. *Earl of Shrewsbury* (1), "If a man grant me herbage and pannage of his park, and I come into the park and take the grass and herbs into my hands, or if I gather acorns, this is sufficient seisin for me to have assize, though I do not eat the grass nor the acorns; and for that let us put the case that a man hath herbage granted to him, and he puts in his beasts, and before they eat the grass they are driven out, none will deny but that that should be good seisin." In *Bristow* v. *Cormican* (2) Lord Hatherley says: "There can be no doubt whatever the mere possession is sufficient against a person invading that possession, without himself having any title whatever—as a mere stranger: that is to say, it is sufficient as against a wrong-doer. The slightest amount of possession would be sufficient to entitle the person who is so in possession, or claims under those who have been or are in such possession, to recover as against a mere trespasser." Paragraph 8 of the case shews that the surveyors of highways have, so far back as the evidence of living witnesses extends, exercised a right of possession over both lanes, and the plaintiff is entitled to consider the possession of the local board as his possession. This lengthened possession is sufficient to enable the plaintiff to recover against a mere trespasser. But if the soil was in the lord of the manor, there has been a discontinuance of possession, and

(1) 2 Brownl. at p. 240. (2) 3 App. Cas. at p. 657.

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the possession for the long period enjoyed by the local board and the plaintiff gives them a title by occupancy. If the plaintiff had no other title than occupancy, he may recover on his mere priority of possession as against the defendant: *Catteris* v. *Cowper* (1); *Heath* v. *Milward*. (2)

Dec. 2. *Cave, Q.C.*, in reply. As to the last point, possession is of two kinds, actual and constructive; the first is a manual possession, the second is where a man has a right of possession to land or to a chattel; he then is held to have constructive possession. In the present case the plaintiff must rely upon an actual possession. The public have the right of passing over every part of the pasturage; the plaintiff's possession is subject to this public right, and therefore he has no exclusive actual possession. The right to the soil is either in the lord of the manor or in the owner of the adjoining lands; the local board have no interest in it, nor has their supposed lessee the plaintiff. The plaintiff therefore as regards Cold Harbour Lane is a mere trespasser: *Jones* v. *Chapman*. (3) As to the plaintiff's possession by occupancy there is no pretence for such an argument. The plaintiff has never been in actual possession. The lord of the manor has not by a discontinuance of possession lost his right to the soil; no jury would ever find he had been out of possession, and the Statute of Limitation could not be set up as a bar to his claim: *Smith* v. *Lloyd*. (4)

With regard to Endyke Lane, the street never vested in the local board so as to pass the freehold in the soil to them. In *Hinde* v. *Chorlton* (5) the question was whether the appellant was entitled to a county vote, and that depended on the construction of a private Act (5 Geo. 4, clxiv). By s. 31 the trustees were empowered to sell the fee simple and inheritance of such of the pews in the body of the church as were not otherwise appropriated, and that on the execution of the conveyance such pew should be vested in the purchaser. Willes, J., says: "The language of ss. 31 & 32 appears to me to be satisfied by holding that they gave a right to the trustees to grant, not the soil and freehold of

(1) 4 Taunt. 547.
(2) 2 Bing. N. C. 98.
(3) 2 Ex. at p. 821.
(4) 9 Ex. 562. See also *Smith* v. *Stocks*, 38 L. J. (Q.B.) 307.
(5) Law Rep. 2 C. P. 104.

the pew, but the right to the pew, that is to say, the right to use the pew for the purpose of hearing divine service whenever it was celebrated in the church . . . There is a whole series of authorities in which words, which in terms vested the freehold in persons appointed to perform some public duties, such as canal companies and boards of health, have been held satisfied by giving to such persons the control over the soil which was necessary to the carrying out the objects of the Act without giving them the freehold. In *Stracey* v. *Nelson* (1) it was provided by an Act that certain lands should be vested in the commissioners of sewers, and the Court notwithstanding held that only the control over the land and not the freehold passed to them." A similar construction was put on the word "vest" in *Brumfitt* v. *Roberts* (2); *Greenway* v. *Hockin*. (3) According to *Parsons* v. *St Mathew, Bethnal Green* (4), if the soil vested in the local board, they would be in a different position to surveyors of highways: *Gibson* v. *Mayor of Preston* (5) shews that the soil of a street does not vest in the surveyors of highways. Section 57 of the Public Health Act, 1875, shews that the local board have not the absolute property in the streets, for by incorporating some of the provisions of the Waterworks Clauses Act, 1847, it gives them power to break up the streets. If the freehold in the streets had belonged to them it would have been unnecessary to give them power to open their own soil. Moreover, s. 57, when referring to the power of a local authority, simply uses the words "the control of;" if any distinction had been intended between the phrases "the control of" and "vest in," both would have been used in that section which defines the powers of the board.

BRAMWELL, L.J. I am of opinion that the judgment of the Court below should be affirmed. Speaking with all respect, as I think we ought to do of an Act of Parliament, and not finding any fault with it—because I believe there is nothing more difficult than to draw an Act which in every detail shall work harmoniously —I confess I have my misgiving as to the meaning of the word

(1) 12 M. & W. 535.
(2) Law Rep. 5 C. P. 224.
(3) Law Rep. 5 C. P. 235.
(4) Law Rep. 3 C. P. 56, 60.
(5) Law Rep. 5 Q. B. 218.

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"vest"—speaking then with all respect of s. 149 of the Public Health Act, 1875, which section is nearly a repetition of s. 68 of the Public Health Act, 1848, I find it very difficult to put a meaning upon that word. I am strongly inclined to put the same meaning on that word which Willes, J., has put upon it in the case cited (1), supported as his opinion appears to be by the reference he makes to numerous authorities, none of which are enumerated in his judgment, but which he says do exist. Coming as it does from that learned judge his opinion is entitled to the highest respect. And on account of the reasonableness of such an interpretation I am disposed to hold that this "street" vests without any property in the freehold of the soil. The word "vest" may have two meanings; it may mean that a man acquires the property usque ad cœlum and to the centre of the earth, but I do not think that to be its meaning here. One construction of the word "vest" here is that it gives the property in the soil, the freehold, the surface, and all above and below it; but that would be such a monstrous thing to say to be necessary for the proper control of the streets by the local board, that I cannot suppose it to mean such a thing. Suppose the soil of the freehold passes, and consequently it carries the right to the land to an indefinite extent upwards, and to the centre of the earth below the surface: I cannot make up my mind to say that is the meaning of the word "vest" in s. 149. I do not think the Act (2) of the last session bears upon this question, because I read that Act to mean that, whatever may be the natural construction of s. 149 of the Public Health Act, 1875, it shall not be construed to pass minerals. But the inconvenience and injustice of holding that the word "vest" would have that effect prevents my putting that construction upon it. What then is the meaning of the word "vest" in this section? The legislature might have used the expression "transferred" or "conveyed," but they have used the word "vest." The meaning I should like to put upon it is, that the street vests in the local board qua street; not that any soil or any right to the soil or surface vests, but that it vests qua street. I find some difficulty in giving it a meaning, and I do not

(1) *Hinde* v. *Chorlton*, Law Rep. 2 C. P. 104.
(2) 41 & 42 Vict. c. 77, s. 27.

know how far it adds to the words, "shall be under the control of." The meaning I put upon the word "vest" is, the space and the street itself, so far as it is ordinarily used in the way that streets are used, shall vest in the local board. I will refer to a few instances in support of this construction. The streets vest; the pavement, the stones, and other materials vest; all buildings vest which would seem to mean railways, and building implements which are chattels, and other things "vest" in the local authority. This Act also provides that the urban authority shall cause all streets to be levelled, paved, metalled, flagged, channelled, altered and repaired as occasion may require; they may cause the soil of any such street to be raised, lowered or altered as they may think fit, and may place and keep in repair fences and posts for the safety of foot passengers; any person who without the consent of the urban authority wilfully displaces, or takes up, or injures the pavement stones, materials, fences or posts, or the trees of such street shall be liable to a penalty not exceeding 5*l.*, and to a further penalty not exceeding 5*s.* for any square foot of pavement stones or other material so displaced and injured; he shall also be liable in case of any injury to the trees to pay to the local authority such amount of compensation as the Court may award. Does that mean that the local board have a property in the tree and in the soil? I doubt very much whether that ought to be the construction put upon that enactment, but if it is, it goes a long way to shew that the local board had such a property as they claim in this herbage. Even if it does not, if it will not apply to the tree which although surrounded by the street could be said in one sense to be no part of it, for the public had no right to pass over where the tree stood; and if it does not apply to a tree now in existence, but only to the trees the local board may plant or become otherwise entitled to, why even then it would shew that they must have some property in the soil and its produce; that would assist the contention in favour of the plaintiff. Mr. Cave called our attention to s. 57 of the Public Health Act, 1875, incorporating some of the provisions of the Waterworks Act, 1847. That section is adverse to him; it evidently contemplates that when the local authority has not the control, it was necessary to give them power to break up the streets for the purpose of laying

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pipes, and by implication it follows that where they have the control of the streets, it is not necessary to give them such power. That would shew that "street" comprehends what we may call the surface, that is to say not a surface bit of no reasonable thickness, but a surface of such a thickness as the local board may require for the purpose of doing to the street that which is necessary for it as a street, and also of doing those things which commonly are done in or under the streets; and to that extent they had a property in it. I think I am fortified in this opinion by the expression of Willes, J., in the case referred to.

As to the other part of the plaintiff's claim against which judgment was given in the Court below I concur in that judgment. I think the plaintiff has not been able to make out his case. It was attempted to be made out in this way; it was said that there was a de facto possession. But it is difficult to say that there is a de facto possession, when there is no possession except of those parts of the lane which are in actual possession, and there is an interference with the enjoyment of the parts which are not in actual possession. My meaning is this, if there were an inclosed field and a man had turned his cattle into it, and had locked the gate; he might well claim to have a de facto possession of the whole field; but if there were an uninclosed common of a mile in length, and he turned one horse on one end of the common he could not be said to have a de facto possession of the whole length of the common. If it would not be a de facto possession it would be a nominal possession. If no right were attached to it, it would not be a constructive possession. That I look upon as being the condition of things, and consequently the plaintiff had not a de facto possession beyond the spots where his animals were grazing.

Then a suggestion was made that the action peradventure might be maintained in this way; that by a discontinuance of possession, the lord of the manor or other person lawfully entitled to the soil in the private road had lost his title, and consequently it was in the first actual occupant for the time being, who was the local board, and that they had licensed the plaintiff, and therefore the plaintiff was in, as it were, by right. The answer to that argument is, that no jury ought under the circumstances to find that there had been such a cession of possession by the person who had

title to the soil so as to admit of the application of the Statute of Limitations. Therefore I think the plaintiff's claim on this second head cannot be allowed, and the judgment of the Court below on both points was right.

BRETT, L.J. In order to determine the two questions in this case it is advisable to consider for what the action is brought, and how it is brought. The action is brought under the Judicature Acts, and, since the passing of those Acts, forms of action no longer exist. This is not necessarily an action of trespass; it is an action in which the plaintiff states the facts of his case and asks for a remedy. The plaintiff has stated facts which he alleges shew that he is entitled to a remedy against the defendant, in respect of certain acts of the defendant done in two separate lanes. The plaintiff, although he does not, by the form of his action, necessarily allege that he has the rights of a person who would have been entitled to maintain an action of trespass, yet he does in argument really assert that with regard to both lanes he would have been entitled to maintain an action of trespass. With regard to the first lane, he alleges that he would be entitled to maintain an action of trespass, because the property in the soil was in the local board, and that the local board have let the possession of certain portions of the land to him; as to the other lane, he admits that the local board could have no right of property in it; but he alleges that he had possession of that lane, and that the defendant is a wrong-doer in respect of his possession; therefore, in argument he asserts that he would have been entitled in respect of both lanes to maintain an action of trespass.

The question is therefore, with regard to the first lane, has the plaintiff any rights upon which the defendant has encroached, and for encroachment upon which the plaintiff is entitled to some remedy? As to the second lane, the question is whether the plaintiff was in possession, so that he might maintain an action against the defendant, as a wrong-doer? With regard to the first question, I think that the plaintiff's right, whatever it is, depends entirely upon the right of the local board. The plaintiff's right depends upon whether the local board had power to make any arrangement with him with regard to the pasturage. Whether

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the local board had any right to make an arrangement with the plaintiff, depends upon the construction of s. 149 of the Public Health Act, 1875. It is admitted that the first lane is a street within the definition of s. 4. What right then does s. 149 give to the local board in a street as defined by that section? In construing this enactment we must give a meaning to every part of the section, and the ordinary legal signification to the words used, unless there is something in the context to shew that they are otherwise used. The words of the section are that all streets shall vest in, and be under the control of, the urban authority. According to the ordinary rules of construction we must give an interpretation if we can, not only to the words "be under the control of," but to the words "vest in;" and we must give, if we can, some meaning to the words "vest in," other than and different from that which we give to the words "be under the control of." What is the ordinary legal signification of the words "vest in" when applied to the subject-matter of property? I think its signification is to give a property in. It has been argued that reading this section with s. 57 we ought to say that the words "vest in," in s. 149, mean shall be "under the control of;" if that be its meaning it would in effect strike out of the section the words "vest in," and then the section would be read as merely containing the words "shall be under the control of." The words relied upon in s. 57 are mere words of reference, and I think it would be contrary to all rule to say that mere words of reference in another section are to have the effect of striking out in s. 149 words to which we must give a meaning. Sect. 57 can have no effect whatever in construing s. 149, which must be construed as it stands by itself, and we can give no other meaning to the words "vest in," except to say that it gives the property. It has been suggested that this meaning is so wide that it would give to the local board cellars which may be under the street, or houses that may be built over the street; or indeed, mines, however deep lying under the street. But when we have decided that the words "vest in," mean to give a property in, a further question would be in what does it give the property? that must depend upon the subject to which those words relate, and that is not land, but street; the section does not say that the land "shall vest in," but

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that "the street shall vest in." I think that the case of *Brumfitt* v. *Roberts* (1) is a guide in construing this section. The words of the private Act in that case were, that the fee simple of the pew should be vested in the subscribers or proprietors; the Court held that those words did not vest the land over which the pew was. So here, the words of this section vest the property in the street; and the street does not include the houses by the side of the street; it includes the space between the houses which is used as the footway and roadway. "Street" means more than the surface, it means the whole surface and so much of the depth as is or can be used, not unfairly, for the ordinary purposes of a street. It comprises a depth which enables the urban authority to do that which is done in every street, namely, to raise the street and to lay down sewers; for, at the present day, there can be no street in a town without sewers, and also for the purpose of laying down gas and water-pipes. "Street," therefore, in my opinion, includes the surface and so much of the depth as may be not unfairly used, as streets are used. It does not include such a depth as would carry with it the right to mines, neither would "street" include any buildings which happen to be built over the land, because that is not a part of the street within the meaning of such an Act as this. If the enactment gives the local board that property in so much of the land, it gives them the absolute property in everything growing on the surface of the land. The legislature have, because the right of owners to the soil in a "street" is of so little value, intentionally taken away that right and have given it to the extent I have mentioned to the local board. I think that the local board, with regard to the first lane, had to a certain depth of the land and to the whole surface the ordinary rights of proprietors. If that is so, the local board were entitled, by reason of that right of property, to let some of it to the plaintiff: they, therefore, by agreement let to the plaintiff a right to the herbage and pasturage in certain portions of this land. It is not necessary, with regard to the first lane, to say that they gave him the possession of that lane; they gave him the right to feed his cattle upon the grass in that lane, and upon that right the defendant has encroached; and, therefore, although the plaintiff might not

(1) Law Rep. 5 C. P. 224.

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have been able, under the former procedure, to have maintained an action for trespass, he could have maintained some action, and he has a right to maintain that action under the new procedure of the Judicature Act.

With respect to the second lane, it is admitted that the local board had no such rights as they have with regard to the first lane, but the plaintiff alleges that he has possession, and that the defendant is a wrong-doer. It is important to inquire what was the possession of the plaintiff. He had no other possession but by the mouths of his cattle; in one sense, it may be said that he never possessed anything except that which his cattle put into their mouths. If I thought that the local board were assuming to let to the plaintiff this lane, as an owner would let a close, although they had no right to do it, and if the plaintiff had his cattle at one moment on one part and at another moment on another part of the close, with the belief that he had the exclusive possession as owner of the whole close, I should be inclined to the opinion that then it might be said that, although the local board had no right to let to the plaintiff, he had possession of the whole by his cattle. But I am of opinion that there was not a letting of the exclusive possession of the land, for this reason, that it must have been the intention of the local board that any of the public should walk over any part of the same and tread down any part of the grass; they did not intend to give the plaintiff possession in the sense in which a tenant has possession of a field, whether it be inclosed or open. They did not intend to give the plaintiff possession of any given space of land; all they intended to give, and all that is expressed in their agreement, is that they took a sum of money for allowing the plaintiff's cattle to feed upon the land; whether the agreement amounts to a power of agistment, so that other persons could not have agisted thereon, it is immaterial to inquire. The fallacy of the plaintiff's argument is, that because the word "herbage" is used in the agreement, that, therefore, the vestura terræ of the land passed. I do not think it did; it was an agreement by which, if plaintiff's cattle went on the land, the local board were to be paid so much. Under these circumstances, in my opinion, it cannot be said that the plaintiff had any possession of the land, and therefore he cannot,

as against the defendant, maintain any action whatever. I am of opinion that the judgment of the Queen's Bench Division was right on both points.

COTTON, L.J. The first question is with reference to Endyke Lane, which is admitted to be a highway, for since 1818 it has been maintained and repaired by the parish. It therefore comes within s. 4 of the Public Health Act, 1875.

The question we have to consider is this, whether or no the local board, under whom the plaintiff claims, have any right to the grass —it is sufficient for the purposes of the present case if they had any right to the property on the surface of this lane. It is contended on behalf of the defendant that the local board had no such right: that s. 149 gave them no property on the surface of the street, that the words "vest in" mean that the street shall be used for the purpose of a street, and no profit in respect of it shall be paid to the local board. On the other hand, the plaintiff contends that a right of property in the soil of the street is vested in a local board; and I may observe that there is no question but that the whole of the surface where the grass grows is street, because under the Inclosure Act the whole of a given space, although not used apparently by the public, is a part of the public highway. Before I address myself to the construction of the section, I will deal with that part of Mr. Cave's argument which relates to the passing of the property to the local board. He said that where a public body has public duties to perform, these words which primâ facie vest the property in the soil in them would be construed as not giving them the property in the soil, but as giving them such rights and powers over the soil as are necessary for the purpose of enabling them to carry into effect their public duties; and he principally relied on the case of *Hinde* v. *Chorlton* (1), not as a direct decision in his favour, but as a case from which he would draw that proposition from the observations of Willes, J. Great weight is due to the authority of that learned judge, but his judgment, in my opinion, does not in any way support the contention of the defendant. In construing an Act of Parliament or other document, we must look to the words actually used. In that case

(1) Law Rep. 2 C. P. 104.

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the question was whether or no the right in a portion of the freehold passed to a certain person under a particular Act of Parliament vesting in him a pew, and Willes, J., held that in the construction of that statute, what was to vest was not the pew as a certain definite portion of the freehold of the church, but only a right to use the pew; and he did not therefore give an interpretation to the word "vest" only, but looked at the Act, for the purpose of construing the subject-matter, which was whether the person had a right to a pew which he occupied, and to the land on which the pew stood, whereas the Act in dealing with the subject speaks only as to the right of user. His entire judgment is this: that on the true construction of the Act, the Act vests in the party not a material part of the church, but the right to use it for a specified purpose: that is, the particular purposes of the church. That disposes of the judgment. I should entirely concur, under other circumstances, with the construction of Willes, J., of this particular Act of Parliament, and with his views expressed in *Hinde* v. *Chorlton* (1), where he says, "There is a whole series of authorities in which words which in terms vested the freehold in persons appointed to perform some public duties, such as canal companies and boards of health, have been held to be satisfied by giving to such persons the control over the soil, which was necessary to the carrying out of the objects of the Act, without giving them the freehold." He refers to a series of authorities, and I am surprised that none of the authorities were quoted except *Stracey* v. *Nelson* (2), and I think that that judgment fails to support the defendant's contention. When we examine that case to see whether that and the series of authorities lay down any rule for construing this particular Act of Parliament, we find they do not. The judges who decided that case so construed the clause as to make it vest the subject-matter only which had been purchased either by them or their predecessors in the commission. If all land within the view of the commissioners was a matter of property to vest in them, it would vest in the commissioners thousands of acres over which they had only the supervision and control, for the purpose of seeing it was properly attended to. That case, in my opinion, is rather against the defendant than for him, and in that case, as

(1) Law Rep. 2 C. P. 104. (2) 12 M. & W. 535.

well as in *Hinde* v. *Chorlton* (1), there is not the same difficulty as there is in the present case. Here we have this difficulty: the words are "the streets shall vest in, and shall be under the control of, the urban authority." If the only words were shall "vest in," there would be less difficulty in the contention of the defendant, that they meant that the control of the streets should be vested in the local board, but that they should not have any right of property in the soil of the streets. That is not the true construction. Let us see whether that word "vest" was not a word before this Act passed, which had an admitted meaning. I will refer to the Lands Clauses Act, 1845, which enacts certain clauses, which have been introduced into other Acts, under which land has been acquired. By s. 81, "All conveyances made according to the forms of the said schedule, or as near thereto as the circumstances of the case will admit, shall be effectual to vest the lands thereby conveyed in the promoters of the undertaking." So again by s. 100, if the landowner refuses, on tender to him by the promoter of the undertaking of the purchase-money, to execute the conveyance, the promoters may if they think fit execute a deed-poll, and the Act of Parliament shall vest in the promoters the land which they require for the purposes of their undertaking. Again, I may refer to what I am possibly more familiar with than those who usually practise here, the Trustee Act of 1850, where the Court of Chancery has power given to it to make orders for transferring to new trustees the freehold and other property vested in trustees, who cannot be found or who are incompetent to deal with the property themselves. By s. 3 the Court of Chancery is to make an order with respect to the estate of lunatics, "that such lands," that is to say, the lands held by a lunatic trustee, "be vested in such person or persons in such manner and for such estate as he shall direct, and the order shall have the same effect as if the trustee had been sane and had duly executed a conveyance." Then, to go to another class of precedents, by the the Bankruptcy Act, 1869, s. 17 "Until a trustee is appointed the registrar shall be the trustee for the purposes of this Act, and immediately upon the order of adjudication being made, the property of the bankrupt shall vest in the

(3) Law Rep. 2 C. P. 104.

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registrar: on the appointment of a trustee, the property shall forthwith pass to and vest in the trustee appointed." When we come to the Act in question, and construe one clause by another, we find in s. 12 that all "property, real and personal, including all interests, rights, and easements into and out of property real and personal, including things in action, as belongs to or is vested in, or would but for this Act, have belonged to or been vested in the council of any borough, &c., shall continue vested, or vest in such council, &c." That is to say, where there is a new board constituted as the local authority, the property becomes vested in them as the new board. That being so, it is remarkable that the section next following contains almost the same words as regards sewers that we find in s. 149 with reference to streets, namely, that "sewers shall be vested in and be under the control of the local board." It is impossible, I should say, to attribute to any one the intention of using in s. 13 the word "vest" in a different meaning from that used in s. 12, which is the immediately preceding section. Therefore, on the true construction of this Act of Parliament, the meaning to be given to the words "vest in" must be "passed to and vested in" the local board; it is sufficient in the present case to say that the street and the surface vested in the local board some property in the soil for the purpose for which it was to be used, and in my opinion I must hold that the "street" is a material thing, and that under this clause it vests in the local board.

With regard to the cross appeal, it is admitted that the local board had no title to the soil of Cold Harbour Lane. It was contended on behalf of the plaintiff, that although that was so, yet he had such possession as to enable him to maintain an action of trespass under the old procedure against the defendant, and that therefore he could still maintain his action. His contention was that he had asserted his right—I use that word intentionally—under the lease, which was in the nature of a grant to him within the words of Lord Coke of vestura terræ, or herbagium terræ, and he had by what he had done in one particular portion of the lane taken possession of the whole of the grass. I think that argument depends upon a fallacious application of what was said by Lord Coke. He there refers to a case where there was a grant of

the vestura terræ, giving the grantee an absolute and exclusive right for all purposes to whatever was growing on the land, so that if any one entered and walked over the land, it would have been an injury to the grantee, he having the exclusive right as against all others to the vestura terræ. But in this case it is different; the public have a perfect right of going over this highway and walking over this grass, and the plaintiff could not say they were encroaching upon the rights which he had acquired under the grant. What he had obtained was a very limited right subject to the use by the public of this piece of ground; it was but a mere limited right of enjoyment of the grass subject to the rights of others, and the plaintiff's exercise of such a right under such a grant could not, in my opinion, be a possession of the soil in such a way as to entitle him to maintain an action against the defendant for injury to that grass. The plaintiff in this case cannot rely upon any question of right independent of enjoyment by mere possession, and there is no right or possession which would entitle him to maintain an action.

Judgment affirmed.

Solicitor for plaintiff: *Stirke, for J. Seymour Moss, Hull.*
Solicitor for defendant: *Morris, for Spears.*

[IN THE COURT OF APPEAL.]

Dec. 19.

PHILIPPS *v.* PHILIPPS AND OTHERS.

Practice—Pleading—Embarrassing Statement of Claim—Action for the Recovery of Land—Title, General Allegation of Plaintiff's—Rules of Supreme Court, Order XXVII., rule 1.

In an action for the recovery of land of which the plaintiff has never been in possession, the statement of claim must allege the nature of the deeds and documents upon which he relies in deducing his title from the person under whom he claims; and a general statement, that by assurances, wills, documents, and Crown grants in the possession of the defendants, without further describing them, the plaintiff is entitled to the land, is embarrassing, and liable to be struck out under the Rules of the Supreme Court, Order XXVII., rule 1.

CLAIM. The plaintiff is a baronet, and heir male of the body of Sir T. Philipps, of Picton Castle, Knight, who was living in the

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year 1513. The plaintiff is also heir male of the body of Sir John Philipps, of Picton Castle, Bart., who died in or about the year 1629. The plaintiff is also heir-at-law of Sir Erasmus Philipps, of Picton Castle, Bart., who died in or about the year 1697.

2. The plaintiff is also the heir-at-law of the first Lord Milford, who died in or about the year 1823, there being no legitimate descendants now living of Bulkeley Philipps, the uncle of the said Lord Milford.

3. The plaintiff is also eldest son of the late Sir James Evans Philipps, Bart., who died in 1873, and whose residuary estate on his death became and was vested in the plaintiff by the last will and testament of the said Sir James Evans Philipps.

4. The plaintiff says that under and by virtue of certain deeds, assurances, wills, and documents in the possession and control of the defendants, the plaintiff is entitled to the possession of the said premises and hereditaments claimed herein in the plaintiff's writs as such heir male, heir-at-law, and residuary devisee, or as being the person entitled to the baronetcy now held by the plaintiff.

5. In the alternative the plaintiff alleges that the said Sir Thomas Philipps, Sir John Philipps, Sir Erasmus Philipps, Lord Milford, and Sir James Evans Philipps were at the times of their respective deaths seised in fee of the said premises and hereditaments.

6. The plaintiff in the alternative alleges that he is entitled to possession of the said premises and hereditaments, or some of them, under divers crown grants which are in the possession and control of the defendants.

7. The defendants are and lately have been in possession of the said premises and hereditaments, and have received the profits thereof, but refuse to give the plaintiff possession of the said premises and hereditaments, and to pay over or account for the profits.

A summons returnable before the master was taken out at the instance of the defendants to strike out the statement of claim as tending to embarrass (1) the fair trial of the action. The master

(1) By Order XXVII., rule 1, the Court, or a judge, may, at any stage of the proceedings, allow either party to alter his statement of claim, or may order to be struck out or amended any matter in such statements . . . . which may tend to prejudice, embarrass, or delay the fair trial of the action.

made no order. On appeal to the judge he dismissed the summons. The defendants appealed to the Queen's Bench Division. At the hearing before Mellor, J., and Huddleston, B., the Divisional Court (Mellor, J., doubting) affirmed the judge's order.

The defendants appealed.

Dec. 18. *Cave, Q.C., and Whitehorne*, for the defendants.

Dec. 19. *Kingdon, Q.C., C. Bowen* (*B. B. Rogers*, with them), for the plaintiff.

The arguments fully appear in the judgment of the Court.

BRAMWELL, L.J. I think this appeal must be allowed. The statement of claim alleges that the plaintiff was heir male of the body of Sir Thomas Philipps, of Picton Castle, Knight, who was living in the year 1513. It is added in paragraph 5 that Sir Thomas Philipps was at the time of his death seised in fee of the premises therein mentioned. Now if those were the only two statements with respect to Sir Thomas Philipps, it is clear that no title would be shewn, because it would not follow, in the first place, that because the plaintiff was heir male of the body of Sir Thomas Philipps he was entitled; and in the next it would not shew any seisin in himself, or those under whom he claims, within twenty years; it would not shew any such title that the Statute of Limitations would not be a bar to it (1); so that those two allegations taken together clearly would be insufficient and demurrable. In order to prevent a demurrer to them, for the reasons I have stated—I will take the case of Sir Thomas Philipps only—the plaintiff puts in this further allegation: by virtue of certain deeds, assurances, wills, and documents in the possession and control of the defendants, the plaintiff is entitled to the possession of the said premises and hereditaments as such heir male of Sir Thomas Philipps. That is a statement which, if true, shews a good title in the plaintiff, because it alleges that as heir to somebody he is entitled to possession: if he is entitled to possession he is entitled to maintain this action, and therefore the defendants cannot demur. But the allegation is not an

(1) See *Dawkins* v. *Lord Penrhyn*, 6 Ch. D. 318, affirmed in the House of Lords, Nov. 27, 1878; Weekly Notes, 1878, p. 225.

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allegation of one fact, it is an allegation of, for aught I know, fifty facts, because the assurances, and deeds, and documents that are mentioned may be so many in number: and it is an allegation of all the legal consequences that follow from those facts. Then it is argued, on behalf of the plaintiff, the meaning of a deed is always a fact. It is a novelty to me. I never heard that the effect of written instruments was a matter of fact. It is not a matter of fact; the proper course for the plaintiff to have adopted would have been to set forth the purport of the document, and then the document could be looked at and the question decided. To my mind, therefore, it is demonstrative that this pleading is embarrassing and not according to the rules. Suppose that, instead of this general allegation, it had been said that one of the persons in the pedigree from Sir Thomas Philipps to the plaintiff made a certain deed, the effect of which was that the plaintiff was entitled to possession: Would that have sufficed? It is abundantly obvious that it would not. It would have stated the making of the deed as a fact, but instead of stating what was in the deed, it would have stated as a fact a conclusion from it, which ought to have been established by shewing the contents of the deed. I say, therefore, it is abundantly, to my mind, demonstrative that the pleader has not pleaded as he ought to have done according to the rules.

Then it is further said this mode of pleading is unavoidable. See what the effect of that argument is—that every pleading may be framed in an embarrassing way because the plaintiff may say peradventure it is unavoidable. It not only would be an answer to this particular case, but it would be an answer in every case. A man might bring an action on a bill of exchange and say the defendant is a party to a bill of exchange which he has in his possession; that the plaintiff is the lawful holder of it, and is sure that he is entitled to 50*l.* at least under it. Then he might say he had made these statements because he could not help it. There is not a single pleading which might not be pleaded in an embarrassing way on that assertion. What is the remedy for the plaintiff's difficulty? To my mind an obvious one. Instead of driving the defendants to ask for particulars of the statement, which I think is a most objectionable proceeding, what the plaintiff ought

to have done, on this objection being made, would have been to produce an affidavit shewing how matters stood, and asking that the summons to amend these pleadings might be adjourned until he got discovery; and then to make an independent application for discovery. That is my notion of how such a difficulty as this ought to be obviated. To that it is argued no one ever heard of such a thing being done. If I were to answer that question I should say, scores of times. It has happened to me over and over again when such an application has been made to me, at least in an analogous case where the application is for further and better particulars of demand, and the plaintiff says that he cannot give them, because the materials for giving them are in the possession of the defendants; I have always said a plaintiff cannot be permitted to go to trial and say that he was entitled to a sum of money, but that he cannot give the defendant any particulars of it. Such a case has constantly occurred, and what I have always said is this, the plaintiff must give the particulars; if he has an affidavit that he cannot give them I will adjourn this summons for better particulars and he may make an application for discovery. That is the right course to adopt, and the only course in my opinion. It is impossible that a plaintiff can plead embarrassing pleadings contrary to the rules that have been framed for making them clear and distinct, on the surmise that there may be a difficulty in stating that which the rules require. The object of the rules is threefold. It is that the plaintiff may state what his case is for the information of the defendant, and that the plaintiff may be tied down to it and not spring a new case on the defendant; secondly, that the defendant may be at liberty to say, that the statement is not sufficient in point of law, and to raise the point on demurrer; and thirdly, that the defendant, instead of being driven to deny everything by an ambiguous and uncertain statement involving conclusions of law as well as actual facts, and so going down to try an expensive issue, may be at liberty to single out any one statement, and to answer it. That cannot be done here.

One other remark I have to make is this. It is manifest on this statement, and not a word has been said in justification of it, that the plaintiff in the alternative alleges that he is entitled to the lands under various Crown grants. What possible justification

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is there for that? Why is not the Crown grant to be stated? Is there any difficulty in the way of stating it? The conclusion I draw from the whole of this pleading is that it is a sort of fishing statement of claim, and that the plaintiff might really almost as well have made his statement of claim in this shape: "I am entitled to the possession of these premises, and I call on you, the defendants, to inform me what answer you can make." I consider it is a wrong mode of stating the claim, and that the appeal must be allowed.

BRETT, L.J. I am of opinion that this pleading is embarrassing within the rule, and therefore it ought to be set aside. I think it is embarrassing because, by a general statement, the plaintiff has prevented the defendants from demurring, and at the same time has omitted to state the facts which he ought to have stated, and the facts on which he will have to rely at the trial if he has any case. If the only defect in the pleading was that it was demurrable, I should not on that ground have thought it embarrassing; but the embarrassment consists in putting in a general statement which prevents a demurrer, and at the same time leaving out the particular facts which would give the defendants the knowledge of what the plaintiff's case is.

One thing seems clear, that in an action for the recovery of possession of land the statement of claim is subject to the same rules as every other statement of claim. It seems to me that rule 15 of Order XIX. shews that. The words of rule 4 are sufficient to comprehend the statement of claim in an action for the recovery of possession of land, and rule 15, dealing with that action, gives certain privileges to a defendant who is in possession by himself or his tenants to plead generally. It shews, therefore, that those who drew that rule had the importance of this kind of action in their minds. They deal with one part of the pleadings particularly, and they leave the other part under the general rule. The statement of claim, therefore, in an action to recover possession of land is within rule 4. I think it quite clear that the present statement is wholly insufficient. I will not say that it is easy to express in words what are the facts which must be stated and what matters need not be stated. I know that great pains were taken

to draw rule 4, and it is difficult to state the matter more clearly than in that rule. The distinction is there pointed out that every pleading shall contain a statement of the material facts on which the party pleading relies, but not the evidence by which they (that is, those material facts) are to be proved. The distinction is taken in the very rule itself, between the facts on which the party relies and the evidence to prove those facts. Erle, C.J., expressed it in this way. He said there were facts that might be called the allegata probanda, the facts which ought to be proved, and they were different from the evidence which was adduced to prove those facts. And it was upon that expression of opinion of Erle, C.J., that rule 4 was drawn. The facts which ought to be stated are the material facts on which the party pleading relies. It was purposely not put: "the facts which will be necessary to support the cause of action;" for the party might not be able to state such facts; as, for instance, he might only know such facts as would render his case demurrable, and could only state facts which would not be sufficient to maintain the cause of action; but he states the facts on which he intends to rely at the trial.

There are some tests which shew practically what the rules mean. I think that in a pleading under the new rules such facts ought to be stated which, if a person had had to state a special case formerly for the opinion of the Court, he would have stated in the special case as facts. If a person had to state a special case as an arbitrator, there are certain facts which he must find and state, but he does not state the evidence upon which he was brought to find those facts; and the difference, although not so easy to express, is perfectly easy to understand. An arbitrator had to state every fact which would support, when proved, the contention of the person on whose behalf he was stating that fact. He did not state the evidence by which he came to find those facts. Now such facts as would be stated in a special case to support or meet the claim are precisely the facts which are to be stated under the new system. It seems to me that there is another test. If parties were held strictly to their pleadings under the present system they ought not to be allowed to prove at the trial, as a fact on which they would have to rely in order to support their case, any fact which is not stated in the pleadings. Therefore, again, in their

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pleadings they ought to state every fact upon which they must rely to make out their right or claim.

It seems to me there is considerable difficulty where a pedigree is brought into a statement of claim, and I am not prepared to say that in my view in all cases a pedigree must be set out. I cannot help thinking that sometimes a pedigree would have to be set out, or parts of it, or facts in it, but that sometimes the pedigree would only be evidence of the facts which have to be proved. The only way in which I can state my view is to say this, Where the facts in a pedigree are facts to be relied upon as facts to establish the right or title, they must be set out, but where the pedigree is the means of proving the facts relied on as facts by which the right or title is to be established, then the pedigree is evidence that need not be set out.

I will now apply some of these observations to the present case. The plaintiff is relying upon several different rights, and I may take it that he is relying upon them alternatively although they may be inconsistent. As to each of those he ought to set out the facts upon which he would have to rely as facts to maintain that right. If all he intended to rely upon was the fact of this remote ancestor being seised in 1513, and the fact that he was his descendant, if that was all he could rely upon, he might plead those facts; but if that was all he could plead it seems to me that the case would be demurrable. It would not be embarrassing but it would be demurrable. But it is obvious that he has other facts upon which he wants to rely. He may wish to rely first of all upon some settlement which may have been made by that ancestor, or on a settlement made by some other ancestor. If he wants to rely on that settlement he ought to give an account of the deed; he ought to state by whom that deed was made, and under rule 24 of Order XIX. to give the effect of that deed; or if he gives some account of the deed, and makes a statement that he cannot give the effect of the deed because it is in the possession of the other side, that might be a statement which he might have made in the old system of pleading to excuse profert of the deed; that would excuse giving so particular an account as he might have otherwise had to give; but it does not excuse him from giving some account of the deed on which he means to rely. If in the

course of the pedigree he intends to rely on the seisin of some particular person, then that seems to me to be a fact in a pedigree which he ought to state; that is a fact upon which he means to rely to prove his case, and he ought then to state that fact. Therefore, here there are documents which in respect of all the titles under which he claims, except one, he was bound to set out. The exception is that on which he relies on the actual seisin of his immediate ancestor saying that he was his eldest son. That might probably be enough, but with regard to that he would have to rely on the case alleged; he could not go into antecedent facts, if he wants to rely on them, because he has not stated them. Therefore as to all the statements, he has omitted facts which he would have had to rely on as facts to establish his right.

The plaintiff's counsel at one part of their argument stated that their mode of pleading would have been just as good if all the deeds had been in the plaintiff's possession, and at another part of their argument they relied much on the fact of the deeds being in the possession of the other side. If the deeds had been in the plaintiff's own possession it is impossible to say that those deeds ought not to have been set out, but if they meant to rely on the fact that those deeds are in the possession of the other side that might excuse a particularity of description but cannot excuse some statement of it. I will deal with the case which the plaintiff's counsel says might exist, that the plaintiff might be really a person entitled to the possession, but does not know anything about the deeds which are in the possession of the other side. It is impossible that the plaintiff can have a knowledge that he is entitled to possession if he knows nothing about the deeds. But it may be said that, although the plaintiff did not know the contents of the deed or the person who made it, he might have an admission either in writing or from evidence which he meant to bring forward from the defendants, that they had a deed in their possession which entitled the plaintiff to the possession of the land; but then if that were the state of things the plaintiff would have a fact upon which he intended to rely as the foundation of his claim, whether rightly or wrongly it would not signify. But that is the very fact he ought to state in his pleadings. He ought then to state the fact that the defendants have upon a particular

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occasion, either in writing or otherwise, admitted that they have a deed in their possession under which he would be entitled to possession. That might be a fact on which he would rely, but if it is a fact then it ought to be stated. But if he has no such admission or evidence, and does not know what the deed is under which he is about to claim, that is, saying, in other words, that he does not know what his claim is. If he does not know what his claim is he has no right to make a statement of claim at all. The plaintiff has made a general statement which prevents the defendants from demurring, and at the same time the omission of the facts prevents the defendants from knowing what the plaintiff's case is, and therefore prevents them from knowing how to meet it. I think that the omission of the facts and the insertion of the general statement make this pleading embarrassing, and on this ground this pleading ought to be struck out.

BRAMWELL, L.J. There was an observation I intended to make which I should like to add to my judgment. The plaintiff says that, by virtue of certain deeds in the possession and control of the defendants, he is entitled to the possession of the premises: he has no right to put those words in his statement of claim. That is not a fact material to his title. It is not a fact that is traversable. If the defendants' counsel were to say: "The said deeds and documents were not in the possession and control of the defendants," he would plead a bad statement of defence obviously, therefore those words ought never to have been put in, and ought, in our consideration of the case, to be disregarded. Then how does the matter stand? It simply stands that he pleads that by certain deeds and assurances the plaintiff is entitled, and then it would be in my judgment hopelessly bad according to the admission of the plaintiff's counsel.

COTTON, L.J. The question which we have to consider here is not whether or no this statement of claim is demurrable, for it is admitted that it is not, but whether, assuming that it is not demurrable, it so states the plaintiff's case as to embarrass the defendants in preparing their defence at the trial of the action. For the purpose of considering this case, in my opinion no reliance whatever can be placed on any old form of pleading or claim in actions

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for the recovery of land. Those are things of the past, and if one is to draw any illustration at all from the old form of pleading in such a case I should say it was adverse to the plaintiff, because we are now dealing with Acts of Parliament and rules which probably were passed to meet difficulties arising from that old form of pleading, and have substituted a new form of pleading in actions for the recovery of land; and we must look to those rules and to common sense to guide us in determining whether or no this pleading does or does not tend to embarrass the defendants, and to delay or prejudice the trial, at the hearing of the action, of the real question in dispute between the parties. Whether or no this is to be considered as a possessory action, or whether or no it is not, evidently the real question between the parties is this: Is, or is not, the plaintiff entitled against the defendants to the land which is the subject of the action. I cannot look upon it as a mere possessory action, because, although formerly in an action of ejectment that was the case, judgment here for the plaintiff would afford him a title according to the statement in the pleadings, being a decision in favour of that title, and probably in the Chancery Division any decree in favour of the plaintiff would be prefaced by a declaration of the title he had established in the suit.

What do the rules and orders tell us about the form of pleading in such a case? It is obvious there is no different form, no different principle applicable to a statement of claim in an action to recover land. First of all I would refer to the Order III., rule 1. The first mention of what is ultimately developed as a statement of claim comes in the form of the indorsement of a writ, and there we have the statement of claim, not referred to as such, but referred to in this way: "The indorsement of the claim shall be made on every writ of summons before it is issued." Then the second rule is: "In the indorsement required by Order II., rule 1" (which I have just read), "it shall not be essential to set forth the precise ground of the complaint or the precise remedy or relief to which the plaintiff considers himself entitled." Then afterwards we come to Order XIX., rule 2, which enables the defendant, if he requires to know the precise ground of complaint, to require a statement of claim to be put in; a statement of complaint it is there called and afterwards a statement of claim. Therefore we

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have this, that the statement of claim is to state the precise ground of complaint. But then we come to Order XIX., rule 4, which requires that the material facts on which the party pleading relies should be stated, and we have a further guide as to what are the material facts to be so stated by rule 18, in Order XIX., which requires that the party in pleading must raise all such grounds of defence, or reply as the case may be, as if not raised on the pleadings would be likely to take the opposite party by surprise. The plaintiff must state the facts which are material for the purpose of enabling the defendant to go to trial, knowing what the issue he really has to meet is, and what is the question between him and the plaintiff, so that he may not be there taken by surprise, and the real question between the parties fail to be decided in consequence of insufficient allegations of the plaintiff. The statement of claim, of necessity, must set out all the facts material to prevent the defendant being taken by surprise, because it is the first pleading, and that which ought to be referred to for the purpose of seeing whether there is a cause of action.

In my opinion, this statement of claim in no way enables the defendants to know what case they have to meet at the trial of this action. I will take the alternative titles. If the plaintiff claims under some deed of entail, as tenant in tail, it is evident that the facts necessary for his case which he must prove are these: that there was at some time, by some instrument an entail created: that he either claims under the first branch or line of descent, or if as a fact the first branch divided at a subsequent period into two, that the elder of those has come to an end, and that he follows on the failure of that elder branch, and that he claims as the first in the second line of descent; the facts are the creation of the entail, the succession of the first series of descendants, and the extinction of that, and then the succession of the second series under which he comes in: or, if he claims as heir at law, that some person whose heir at law he claims to be was seised of this land at the time of his death, and that he claims as his heir; probably it would not be necessary to say that he died intestate. This statement of claim alleges nothing of the kind. One cannot tell whether he alleges that he was entitled under the ultimate remainder in a deed of entail, the successive series of previous limitations

having failed, whether he alleges and means that the person last in possession of this land was the last in an earlier line of descent, and then that he claims, whether he alleges that on the death of the person last seised without issue another line came in; or whether he says he comes in under the person last in possession as heir male claiming through him. I think this is perfectly obvious, that to enable the defendants fairly to meet a case of this sort, where the plaintiff has never been in possession, the plaintiff at least ought to say this: "Such and such a person was in possession of this land—had seisin of it; on his death the title which he had, and under which I claim, devolved under certain facts which I state, either to me or to any ancestor under whom I claim." Then the defendants will fairly and reasonably know what they have to meet. I do not mean to give that as the form in the present case because we do not know any of the facts. We cannot possibly tell what facts are material to be stated, unless we really know what the case of the plaintiff is—which, as he has carefully kept all the facts and particulars out of the pleading, we cannot even guess at. So, as a conclusion, I decline to pledge myself to any opinion as to whether or no it is necessary to state in detail all the line of descent, how he makes out his heirship, and various other matters. It may be that it is only necessary for him to say that he claims as heir of so and so, being the descendant of one of his daughters, or as being the descendant of one of his ancestors in the ascending line. What particulars are to be stated must depend on the facts of each case. But in my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial.

I will deal with the argument which was pressed upon us a great deal. It was said: Assume a plaintiff absolutely entitled to land, but not being able to state with particularity his title, in consequence of the deeds being in the hands of a defendant. I can hardly suppose that a plaintiff does not know something about his title; that he does not know who was last in possession under the title which he now says is vested in himself. But one must remember this. Rules are laid down for the protection of

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persons who are in possession of estates, to protect them against attacks from persons who, hoping to find some blot in their title, sometimes bring actions against them without any reasonable cause. I do not for one moment say that this action is brought without any reasonable ground for supposing the plaintiff is entitled; but if in the present case the rule, established for the purpose of preventing persons in possession of estates from being wrongfully and improperly attacked, works hardly on the plaintiff, that will be the necessary consequence of the rules laid down for the general purpose of protecting property, and preventing people being improperly vexed. But surely the rule is no such hardship. If the plaintiff is doing anything more than merely guessing that by possibility he may make out his title to this estate, he must know something about it sufficient to enable him to state the facts on which he thinks the possession of this estate must come to him. As Bramwell, L.J., has said, even if he has any difficulty in stating his title, he might apply for such discovery as he is entitled to, and afterwards amend his pleading. I say distinctly "as he may be entitled to," because of course the defendants will be entitled to protect themselves against fishing attempts to get at their title-deeds, and will be entitled to prevent any one from getting that which the defendants pledge themselves to contain only their own title, and not to contain any evidence in any way supporting the title of the plaintiff. And I should say, before an order ought to be made for the production of any title-deeds under the control of a person who is in the possession of land, when an attempt to get them is made by a person who never has been in possession, at least the party applying ought to shew some reasonable case which he believes to be true before any Court ought to order a defendant in possession of land to produce his title-deeds, the production of title-deeds obviously exposing a man to many dangers to which he ought never to be made liable.

Appeal allowed. The plaintiff to be at liberty to deliver a fresh statement of claim within five weeks.

Solicitor for plaintiff: *H. W. Reeves.*
Solicitors for defendants: *Iliffe, Russell, & Iliffe.*

[IN THE COURT OF APPEAL.]

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Dec. 10.

THE QUEEN ON THE PROSECUTION OF THE LONDON AND NORTH WESTERN RAILWAY COMPANY, APPELLANTS, *v.* THE OVERSEERS OF THE POOR OF THE FOREIGN OF WALSALL, AND OTHERS, RESPONDENTS.

Borough Rate—District Rate—Railway, whether assessable at full Value or one-fourth of its Value—Sanitary Expenses—Public Health Act, 1872 (35 & 36 *Vict. c.* 79), *ss.* 7, 16—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 207, 211.

By a local Act passed in 1848 commissioners were appointed for sanitary purposes over a district lying partly within and partly without the borough of W. They had power to levy an improvement rate, in which railways were to be assessed at one-fourth of their value. A railway company, whose line ran through the district, were assessed according to the provisions of the local Act up to the year 1872. By the Public Health Act, 1872, urban sanitary authorities were formed, and the council of the borough became the urban authority, and the jurisdiction of the commissioners over the part of their district lying within the borough was transferred to the council. By s. 16, if the Local Government Acts were not then in force in a borough, sanitary expenses were to be defrayed out of the borough rate, provided that, where an urban authority had before 1872 power to levy rates for sanitary purposes, the expenses thereof should be defrayed out of those rates. A borough rate has no limitation in favour of railways. By the Public Health Act, 1875, s. 207, the expenses of an urban authority under the Act were to be defrayed by a general district rate, but if in any district the expenses incurred by an urban authority, being the council of a borough, were in 1875 payable out of the borough rate, they should continue to be so charged. By s. 211, in making a general district rate railways were to be assessed at only one-fourth of their value. A borough rate was made for W. in December, 1876, in order to defray, amongst others, sanitary expenses, in which the railway company were assessed at the full value of their line:—

Held, that the rate was bad, and that a general district rate, under the Public Health Act, 1875, s. 207, should have been made assessing the railway company at one-fourth of the value of their line.

UPON appeal to the quarter sessions for the borough of Walsall, by the London and North Western Railway Company against a borough rate of the 1st of December, 1876, for the borough of Walsall, in which the appellants were rated as occupiers of certain buildings and a certain railway in the township of the Foreign of Walsall, the rate was amended by reducing the same, subject to a case.

1. The appellants were the London and North Western Railway

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Company. The respondents were the parish officers of the township of the Foreign of Walsall and the corporation of the borough of Walsall.

2. The borough of Walsall, as it existed previous to the 13th of July, 1876, was a borough with a separate quarter sessions; it comprised the whole of the township of the borough of Walsall and a part of the township of the Foreign of Walsall; each of the townships always had its own overseers and maintained its own poor. The borough, as it existed previous to the 13th of July, 1876, is hereinafter called the old borough.

3. The appellants were the occupiers of land within that part of the Foreign of Walsall, which was within the old borough, part of which land was used as a railway constructed under the powers of an Act of Parliament for public conveyance.

4. By an Act of Parliament passed on the 31st of August, 1848, called the Walsall Improvement and Market Act, 1848 (11 & 12 Vict. c. clxi.), commissioners were appointed for improvement and sanitary purposes over a district consisting of the whole of the township of the borough, a part of the township of the foreign lying within the borough, and a part of the adjoining parish of Rushall, lying without the old borough. This district did not include the whole of the old borough, and is hereinafter called the Commissioners' district.

5. Sect. 7, appointing such commissioners, is as follows:—

> And be it enacted that the mayor and town council of the borough of Walsall aforesaid, together with three such other persons as shall be elected by the owners of property and ratepayers within such part of the limits of this Act as are situate within the parish of Rushall, in respect of the same part of the said limits shall be and are hereby empowered to act as commissioners to carry this Act and the several Acts incorporated therewith, and the several powers thereof, respectively into execution.

6. By s. 40: For the purposes of defraying the costs and expenses of carrying this Act and of the powers and provisions thereof into execution (except the purposes to which any rates to be made for sewers, drains, and private improvements are hereby, and by any Act incorporated therewith, directed to be applied), and including the costs and expenses of making and maintaining and promoting such gasworks as are herein mentioned, and of defraying the expenses of and incidental to the obtaining of this Act, which shall be charged on the improvement rate, it shall be lawful for the said commissioners from time to time to make assess and levy such equal rate, to be called the improvement rate, as may be necessary for the purposes aforesaid, not exceeding in any one year 3s. in the pound of the full

net annual value of the property included in such rate; provided always that the occupiers of any land used as arable, meadow, or pasture-ground only, or as woodlands, market-gardens, or nursery-grounds, and the occupier of any land used as a railway constructed under the powers of any Act of Parliament for public conveyance shall not be assessed to any rate or assessment made by virtue of this Act, or any Act incorporated therewith, in any greater proportion in respect of the same than in the proportion of one-fourth part only of the net value thereof.

8. Up to the passing of the Public Health Act, 1872, improvement rates were levied under the above-mentioned local Act for the purpose of meeting the expenses of its execution, and to all such rates the portion of the railway of the appellants situate within the commissioners' district, was rated at one-fourth of its value in accordance with s. 40 of the Walsall Improvement and Market Act, 1848.

9. By the Public Health Act, 1872, urban and rural sanitary authorities were constituted throughout England, and s. 4 of that Act provided what places should be urban sanitary districts and who should be urban sanitary authorities respectively. In a borough the town council was the urban sanitary authority.

By s. 7: Subject to the provisions of this Act, the Local Government Acts shall be deemed to be in force within the district of every urban sanitary authority, and from and after the first meeting of an urban sanitary authority in pursuance of this Act there shall be transferred and attach to an urban sanitary authority, to the exclusion of any other authority which may have previously exercised or been subject to the same, all powers, rights, duties, capacities, liabilities, and obligations within such district exercisable or attaching by and to a local board under the Local Government Acts, and by and to the sewer authority under the Sewage Utilization Acts, and by and to the nuisance authority under the Nuisances Removal Acts, and by and to the local authority under the Common Lodging Houses Acts, the Artisans and Labourers Dwellings Act, and the Bakehouse Regulation Act, or by and to any of the said authorities under any of such Acts, or any Acts amending such Acts.

By s. 16: All expenses incurred or payable by an urban sanitary authority under the Sanitary Acts, shall, if the Local Government Acts or the provisions of those Acts with respect to rating were at or immediately before the passing of this Act in force throughout the district of such authority, or within a local government district wholly within such district, be defrayed in manner provided by those Acts; and if the Local Government Acts were not so in force at or immediately before the passing of this Act, be defrayed as follows: first, in the case of a council of a borough, out of the borough fund or borough rate; secondly, in the case of improvement commissioners, out of any rate in the nature of a general district rate, leviable by them as such commissioners throughout the whole of their district: provided that where an urban sanitary authority had before the passing of this Act power to levy within its district a rate or rates for paving,

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sewering, or other sanitary purposes, all expenses incurred by such authority in the performance of its duties under the sanitary Acts, shall be defrayed out of such rate or rates, except where at the time of the passing of this Act any such expenses were chargeable upon the borough fund or borough rate, in which case such expenses shall continue so chargeable.

12. By the Sanitary Law Amendment Act, 1874, s. 3: Whereas doubts have arisen as to the extent and meaning of s. 7 of the principal Act, be it therefore declared and enacted that the provisions of the said section shall be deemed to have applied to every authority acting at the time of the passing of the principal Act under the powers conferred upon them by a local Act with respect to any sanitary purposes, and that all the powers, rights, duties, capacities, liabilities, and obligations of any authority having jurisdiction under a local Act in the district of an urban sanitary authority at the time of the passing of the principal Act, so far as they or any of them related to such purposes, were transferred to and became attached to the urban sanitary authority therein referred to.

13. By the Public Health Act, 1875, ss. 5 and 6, further provision is made for the constitution of urban sanitary districts and urban sanitary authorities, to execute the powers of the sanitary Acts within such districts.

14. By s. 10: Where any local Act other than an Act for the conservancy of any river is in force within the district of an urban authority conferring on any commissioners, trustees, or other persons, powers for purposes the same as or similar to those of this Act, but not for their own pecuniary benefit, all the powers, rights, duties, capacities, liabilities, and obligations of such commissioners, trustees, or other persons in relation to such purposes, shall be transferred and attached to the said urban authority.

14a. By s. 207: All expenses incurred or payable by an urban authority in the execution of this Act, and not otherwise provided for, shall be charged on and defrayed out of the district fund and general district rate leviable by them under this Act, subject to the following exceptions: viz., that if in any district the expenses incurred by an urban authority, being the council of a borough, in the execution of the sanitary Acts, were at the time of the passing of this Act payable out of the borough fund or borough rate, then the expenses incurred by that authority in the execution of this Act shall be charged on and defrayed out of the borough fund or borough rate; and that if in any district the expenses incurred by an urban authority, being improvement commissioners, in the execution of the sanitary Acts, were at the time of the passing of this Act payable out of any rate in the nature of a general district rate leviable by them as such commissioners throughout the whole of their district, then the expenses incurred by that authority in the execution of this Act shall be charged on and defrayed out of such rate; and that where at the time of the passing of this Act the expenses incurred by an urban authority in the execution of certain purposes of the sanitary Acts were payable out of the borough fund and borough rate, and the expenses incurred by such authority in the execution of other purposes, were payable out of a rate or rates leviable by that authority throughout the whole of their district, for paving, sewering, or other sanitary purposes, then the expenses incurred by

that authority in the execution of the same or similar purposes respectively under this Act, shall respectively be charged on and defrayed out of the borough fund and borough rate, and out of the rate or rates leviable as aforesaid.

15. By s. 211 (b): The owner of any tithes, or any tithe commutation rent-charge, or the occupier of any land used as arable, meadow, or pasture ground only, or as woodlands, market-gardens, or nursery-grounds, and the occupiers of any land covered with water, or used only as a canal or towing-path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof.

16. On the 13th of July, 1876, an Act of Parliament, called the Walsall Gas Purchase and Borough Extension Act, 1876 (39 & 40 Vict. c. cxix.), was passed for extending the boundaries of the old borough of Walsall and for transferring to the mayor, aldermen, and burgesses of the borough the powers, duties, and property of the commissioners, and for other purposes. The sections of that Act material to the present question are as follows:—

Section 5. Subject to the provisions of this Act, the parish of Rushall, in the county of Stafford, which is comprised within the boundary line described in schedule 4 to this Act (the same being the part of that parish now comprised within the improvement commissioners' district) shall by virtue of this Act be added to and form part of the borough.

Section 6. The corporation shall be the sanitary authority for and throughout the extended borough.

Section 13. On the commencement of this Act, the improvement commissioners shall cease to exist as a body, except for the purpose of winding up their affairs; and they shall absolutely cease to exist as a body on the expiration of three months from the commencement of this Act, unless the improvement commissioners by resolution appoint an earlier time in that behalf, and any such resolution shall have effect accordingly.

Section 14. On the commencement of this Act the gas undertaking works, real and personal property, rights, powers, and interests of the improvement commissioners shall be, by virtue of this Act, transferred to and vested in the corporation, to be held, used, exercised, and enjoyed by them as the same would or might have been held, used, exercised, and enjoyed by the improvement commissioners if this Act had not been passed.

Section 15. On and from the commencement of this Act, the mortgage debts of the improvement commissioners, with all arrears of interest thereon, shall be by virtue of this Act transferred to and charged on the borough fund and borough rate of the borough, and on the corporation's gas undertaking; but if the person for the time being entitled to receive any of those debts at any time after the commencement of this Act requires the corporation to pay the debt due to him, they shall, within six months after being so required, pay the same, with all interest accrued thereon.

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17. By s. 16 the Improvement Act of 1848 was repealed, with the exception of certain sections which were to remain in force, the corporation being substituted in relation thereto for the improvement commissioners. Section 40 of the Act of 1848 was not one of the excepted sections.

The borough, as enlarged by the local Act of 1876, is hereinafter called the extended borough.

18. At a meeting of the town council held on the 9th of November, 1876, it was resolved that a borough rate of 1*s.* 8*d.* in the pound upon the amount of the rateable property should be made throughout the extended borough, and that the mayor should issue his warrants to the parish officers commanding them to pay to the treasurer certain specified sums; and, accordingly, the mayor issued his warrant to the overseers of Foreign of Walsall commanding them to pay the sum of 6333*l.*

19. The overseers of the Foreign of Walsall thereupon made a rate, by which they assessed certain lands and buildings of the appellants, including the land used as a railway, at their full rateable value.

22. It was agreed that the expenses, which the borough rate was intended to meet, included sanitary expenses incurred throughout the whole of the extended borough.

23. It was further agreed that if the council of the borough ought not to have included sanitary expenses in the borough rate, but should have made a general district rate to defray those expenses, the rate in dispute should not be quashed or amended by striking off the whole amount charged to the appellants on account of such expenses; but that in order to save the necessity of making a general district rate, the borough rate in dispute should be amended by reducing the amount payable by the appellants to the amount, which they ought to pay to the borough rate proper and to a general district rate if levied.

27. If the appellants were, in respect of all expenses for sanitary purposes provided for by the rate, only liable to be rated either to a general district rate or to a borough rate in respect of their land used as a railway at one-fourth of the full rateable value thereof, then the order of quarter sessions was to stand.

The question for the opinion of the Court was, whether the

appellants were liable to be rated in respect of the whole of their land used as a railway at one-fourth only of the rateable value thereof in respect of all the sanitary expenses, for which the rate was made.

The Queen's Bench Division affirmed the order of quarter sessions on the authority of *Reg.* v. *London and North Western Ry. Co.* (1)

(1) November 15, 1876.

[IN THE QUEEN'S BENCH DIVISION.]

THE QUEEN ON THE PROSECUTION OF THE OVERSEERS OF THE FOREIGN OF WALSALL, RESPONDENTS, *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY, APPELLANTS.

11 QBD 491

CASE stated upon appeal to the quarter sessions for the borough of Walsall by the London and North Western Railway Company, against a borough rate in which the appellants were rated by the overseers of the Foreign of Walsall, as occupiers of certain land and buildings, including land used as a railway, at the full rateable value. The quarter sessions confirmed the rate subject to a case. The facts, so far as they are material to the present question, were substantially identical with those in the principal case, except that the borough rate appealed from was made after the passing of the Public Health Act, 1875, but before the passing of the Walsall Gas Purchase and Borough Extension Act, 1876.

Anstie and *Jelf*, for the prosecutors.

Bosanquet and *N. Neville*, for the defendants, cited *Walton Commissioners* v. *Walford* (Law Rep. 10 Q. B. 180).

MELLOR, J. There is some perplexity and difficulty in coming to a satisfactory conclusion as to the construction of the various Acts of Parliament, to which we have been referred, but I am of opinion that the partial exemption, which undoubtedly was conferred by the Walsall Improvement and Market Act, 1848, is not affected by the subsequent public Acts. I think that probably the commissioners were still the body, who must carry out the purposes mentioned in that local Act; I do not think that the powers of the commissioners had been transferred to the town council; but upon this I do not wish to speak very positively, for it appears to me that those powers, by whomsoever they were to be carried out, were not put an end to by subsequent legislation. In my opinion the principle of partial exemption remained, and whether the rates for sanitary purposes were to be made by the commissioners or any other body, there was nothing in the statutes removing that benefit formerly enjoyed by the defendant railway company. To show that this partial exemption was not taken away, I may refer to the Public Health Act, 1872, s. 33, which provides that the Local Government Board might, on the application of a sanitary authority, repeal, alter, or amend local Acts relating to the same subject matters as the sanitary Acts. It is conceded that no application had been made under that section, and therefore it appears to me that the Walsall Improvement and Market Act, 1848, remained in force. To my mind an additional

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Dec. 9. *Herschell, Q.C.*, and *Anstie*, for the defendants. The substantial question is, whether the railway company are to be rated at the full value of their line, or at its one-fourth part. The quarter sessions have decided in favour of the company, and the Queen's Bench Division have affirmed their order. It is stated in the case that the company, up to the passing of the Public Health Act, 1872, were rated at one-fourth of the full value of the railway, and it must be admitted that that proportion was

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argument in favour of my view arises upon s. 43, which abolishes the limit imposed as to rating by any local Acts: this enactment, although it abolishes the limit, nevertheless assumes the continuance of the local Acts. I think that these two sections do assist us very much in coming to a conclusion in favour of the railway company, and although I speak with considerable hesitation upon a subject surrounded by many difficulties, I think that these sections afford the real solution of the matter, and that the partial exemption has not been done away with.

LUSH, J. The question is simply this: Were the railway company liable to be assessed upon the full value of their line towards all the expenses for which this borough rate was made? I am of opinion, upon the following grounds, that they were not. By the Walsall Improvement and Market Act, 1848, which first gave authority for raising a rate for sanitary purposes, the company had the privilege of being assessed at only one-fourth of the annual rateable value of their line; and I cannot see in any of the public Acts which have been since passed any provisions repealing by implication, or neutralizing the local Act, or depriving railway companies of the privilege which it conferred upon them. By s. 33, referred to by my learned brother, local Acts were assumed to continue to exist, until an order should have been made by the Local Government Board; and the continuance of their existence is assumed also by s. 34, which provides that the consent of the Local Government Board to the exercise of certain powers conferred by local Acts shall be substituted for that of a secretary of state. Sect. 43 also assumes the existence of local Acts, because it repeals one portion of them leaving all the other provisions untouched. In my view the defendant railway company continued to be entitled to the partial exemption, which the local Act of 1848 bestowed upon them. Whether s. 3 of the Sanitary Law Amendment Act, 1874, was sufficient to transfer the executive authority to the town council is not a matter strictly before us, and may be a question raising considerable difficulties, but I have come to the conclusion that whoever administers the sanitary laws within the borough of Walsall, must put in force the principle of the local Act of 1848, with all the powers not expressly affected by the subsequent public Acts and with the partial exemption which it bestowed.

Order of Sessions quashed and rate sent back to be amended.

Solicitors for prosecutors: *Pearce & Son, for Wilkinson & Gillespie, Walsall.*
Solicitor for defendants: *R. F. Roberts.*

correct under 11 & 12 Vict. c. clxi. s. 40: by s. 7 of that Act, the town council and three other persons were the commissioners for rating the commissioners' district. By the Act of 1872, the rating authority was changed, that is, the town council alone was substituted for the commissioners; and it was not unreasonable that in order to meet sanitary expenses a different mode of rating should be adopted, that is, that a borough rate should be substituted for an improvement rate; for this has been the scheme of former sanitary Acts, such as the Sewage Utilization Act, 1865 (28 & 29 Vict. c. 75). Are then the sanitary expenses since the Public Health Act, 1875, to be paid out of the borough rate or the district rate? That depends upon s. 207 of the Public Health Act, 1875, which contains a general clause that the expenses incurred by an urban authority (which by s. 6 in a borough, is the town council), shall be defrayed out of the district fund and general rate. By s. 211, sub-s. 1 (b), in making the district rate a railway is to be assessed at one-fourth only of its value; no such provision exists in the Municipal Corporation Act as to the borough rate: but the general clause of s. 207 of the Public Health Act, 1875, is subject to certain exceptions, the first of which provides that if the expenses incurred by a town council in the execution of the sanitary Acts, were, in 1875, payable out of the borough rate, the expenses incurred in the execution of the Public Health Act, 1875, shall continue to be so defrayed; and the defendants contend that the borough of Walsall comes within this exception. It is necessary to ascertain out of what fund these expenses in 1875 ought to have been paid. By s. 4 of the Public Health Act, 1872, the town council of Walsall were constituted the urban sanitary authority, including such part of it as lay within the commissioners' district, and by s. 7, interpreted by s. 3 of the Sanitary Law Amendment Act, 1874, the jurisdiction in sanitary matters was transferred from the commissioners to the town council. These sections were administrative and not financial; matters of finance are dealt with by s. 16 of the Public Health Act, 1872; and by that section the expenses of an urban sanitary authority were to be defrayed in the manner provided by the Local Government Acts, if they were then in force within the district. In the borough of Walsall the Local Government Acts

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were not in force in the year 1872, and this being the case, the expenses became, under sub-s. 1, payable out of the borough rate, and the case does not come within the proviso at the end of the section, because the town council were not then the sanitary authority and had no power to levy rates for sanitary purposes. In order to give effect to the proviso, the sanitary body and the district must be the same before and after the passing of the Act. Here, both the authority and the district were different; the old authority was the commissioners, consisting of the town council and other persons; the new authority was the town council alone: the old district was the commissioners' district, including a part of the parish of Rushall; the new district was the old borough, which consisted only of the township of the borough and a part of the township of the foreign. The words "within the district," in the proviso of s. 16, mean within the whole district. Under s. 16, therefore, the sanitary expenses were to be paid out of the borough rate, and under the first exception of s. 207 of the Public Health Act, 1875, the expenses in the execution of that Act must be charged upon the same fund.

It will be contended on behalf of the prosecutors, that the words "in any district" occurring in the first exception to the Public Health Act, 1875, s. 207, mean a district existing at the time of the passing of the Act, and as the rest of the commissioners' district was added to the borough by the local Act of 1876, the borough is not the same, and the extended borough is not a district within the meaning of that enactment; and that at all events the town council have no jurisdiction to levy a borough rate for sanitary purposes within the added portion of the commissioners' district. The local Act of 1876, simply extends the boundary of the borough, leaving to the town council the same powers and duties as they had before; otherwise by the mere addition of a piece of land to the borough, the system of rating would be thrown into confusion. If the argument were pushed to its full extent, the added portion would under the town council be exempt from contribution to those sanitary expenses, to which it was liable under the commissioners. Although the boundary of the borough was altered, the corporation remained the same body, and the incidents previously annexed to it continued to exist:

Attorney General v. *Corporation of Newcastle* (1), *Attorney General* v. *Corporation of Leicester.* (2)

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Dec. 10. *F. A. Bosanquet,* and *N. Neville,* for the prosecutors. The sanitary expenses of the borough of Walsall must be defrayed out of a general district rate, unless at the time of passing the Public Health Act, 1875, they were payable out of the borough rate. Primâ facie there is an inconsistency in making them payable out of the borough rate, which under the Municipal Corporations Act was intended to meet the cost of certain well-known purposes, such as the administration of justice, the maintenance of a police force, and the like. The sanitary expenses of Walsall were provided for by the local Act of 1848, and in assessing the improvement rates under that statute railways were to be assessed only at one-fourth of their net value (s. 40). This Act continued in force until 1872, and although the jurisdiction of the commissioners may have been transferred, yet the powers thereby created, and the limitations to them, were not annulled by the Public Health Act, 1872. Sect. 16, did not make the sanitary expenses chargeable upon the borough fund, for under the proviso the town council, which as an urban authority represented the commissioners, had power to levy the same rates for sanitary purposes, as the latter had before the passing of that Act. The local Act of 1848 was not repealed, it was simply the constitution of the governing body that was changed. It would be a strange alteration if without any adequate reason upon the transfer of the portion of the commissioners' district to the town council, the amount at which the prosecutors' railway was rated should be increased fourfold. It is evidently the intention of the legislature that the same system of rating should continue, and in s. 211 of the Public Health Act, 1875, the same limitation in favour of a railway is introduced as existed in the local Act of 1848. The partial exemption clearly once existed, and it is for the defendants to show that it has been abolished. But, even if the sanitary expenses were by the Public Health Act of 1875 rendered chargeable upon the borough fund, upon the passing of the local Act of 1876, they became payable out of the district rate. They could be payable out of the borough

(1) 5 Beav. 307, at p. 314. (2) 9 Beav. 546.

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fund, only because they were so payable in a district existing in 1875: that district no longer exists; by the addition of a part of the parish of Rushall the borough of Walsall has been extended and its area is no longer the same. The general clause as to rating applies, and the sanitary expenses ought to have been met by a district rate.

The counsel for the defendants did not reply.

BRAMWELL, L.J. I am of opinion that this judgment ought to be affirmed. I feel some hesitation upon the matter, because the statutes which have been referred to are numerous, and I am not very familiar with the law as to rating; but after hearing the arguments I cannot think that the contention for the defendants is correct. The corporation of Walsall are the urban authority for the borough within the Public Health Act, 1875, s. 6, and therefore, primâ facie by s. 207, their expenses incurred in the execution of the Act are to be defrayed out of the district fund and general district rate; but it has been contended for the defendants that the case falls within the first exception mentioned in that section, and that these expenses ought to be charged on the borough fund or borough rate, because at the time of passing that Act the expenses incurred by the corporation in the execution of the sanitary Acts were thus payable. But it seems to me that before the Public Health Act, 1875, the expenses incurred in the execution of the sanitary Acts were not payable out of either the borough rate or the borough fund, and my reason is that by the joint effect of ss. 7 and 16 of the Public Health Act, 1872, either the power of the commissioners appointed under the local Act to make rates for the commissioners' district continued to exist up to 1875, and the town council had no power to make any rate for sanitary purposes within that district, or if the power of the commissioners had ceased, the town council merely succeeded to the same power which the commissioners had previously enjoyed, namely, the power within the area of the commissioners' district to make a rate for sanitary purposes. I can well imagine that difficulties might arise before the passing of the Public Health Act, 1875; but in favour of my view there exists a consideration, which ought to be borne in mind when we are interpreting that

statute. The construction contended for by the defendants to some extent shifts the burden, which previously existed upon the general body of inhabitants, and heightens the obligations of the prosecutors, who are owners of such property as is specified in the Walsall Improvement and Market Act, 1848, s. 40, and the Public Health Act, 1875, s. 211: this construction augments the burden upon them in ease of the burden upon the other ratepayers; no reason can be assigned why the amount of assessment should be altered, and upon referring to the statutes I cannot think that the legislature intended to make any change. In order to prevent an unjust shifting of liability, it was provided by the Public Health Act, 1875, s. 207, that where the whole of the sanitary expenses had been defrayed out of the borough rate, they should continue to be discharged in the same manner; where none of them had been so defrayed a general district rate was to be made; and where some only of the sanitary expenses had been defrayed out of the borough rate, these only and no others were to be charged upon it. This was a just and reasonable provision. It is not for us to consider whether it was originally a prudent measure that property of a certain description should be assessed at one-fourth of its value: but I may observe that this mode of assessment had been followed for years, and that property of that kind had obtained a value dependent upon its partial exemption; for instance, if within this borough a field was let at 10*l.* a year and a house at 80*l.*, these rents were calculated with reference to the circumstance that the field was assessed at only a quarter of its value, but that the house was assessed at its full value; the effect of the construction suggested by the defendants would be to make the field less valuable and the house more valuable in comparison with each other than they were before. Such a change of liability would not be effected without some reason, and none has been assigned.

I repeat that I feel much diffidence in coming to a conclusion upon the subject; but upon the grounds which I have mentioned I think that the judgment of the Queen's Bench Division was right.

BRETT, L.J. In order that the prosecutors may succeed, we must find that in the extended borough of Walsall the expenses in

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respect of sanitary matters can be provided for only by a general district rate, and that no part of them is payable out of the borough fund. I am aware that the question is not brought before us quite in this form; but this is the substance of the prosecutors' objection; if an arrangement had not been arrived at, the proper application would have been to quash the borough rate made in December, 1876; however, as matters stand, we have by agreement only to decide whether the prosecutors' railway is or is not to be assessed to the borough rate at one-fourth of its rateable value. Passing to the substance of the question, as I have just stated it, I am of opinion that all sanitary expenses must be paid out of a general district rate, and are not payable out of the borough fund.

I shall venture to deal with the case in an inverse manner to that, in which Lord Justice Bramwell has dealt with it. In the borough of Walsall from 1848 to 1872 existed two governing bodies: one was the town council acting for the whole of the old borough: the other was the improvement commissioners acting for the commissioners' district. At that time the town council might, and I suppose did, levy a borough rate in aid of the borough fund; but that was done under the powers of the Municipal Corporations Acts, and the only purposes to which the borough fund could be applied were such as were specified in those Acts: the town council had nothing to do with sanitary expenses. By the Walsall Improvement and Market Act, 1848, commissioners were appointed for improvement and sanitary purposes; but their jurisdiction did not extend over the same area as did that of the town council. By certain statutes incorporated with the Act appointing them they were invested with powers not only for sanitary purposes strictly so called, but also others which are now generally regulated by sanitary Acts. The duty was also imposed upon the commissioners of providing funds to meet the expenditure for sanitary purposes, and they discharged that duty by levying an improvement rate, pursuant to s. 40 of their Act; but that rate was with regard to railways subject to what has been called a limitation, that is to say, the rate upon a railway was to be assessed only at one-fourth part of the net value thereof. In my view matters stood in this condition from 1848 to 1872, when

the Public Health Act, 1872, was passed. I agree with the judges of the Queen's Bench Division, who decided *Reg.* v. *London and North Western Ry. Co.* (1), that it is unnecessary to consider whether under the Public Health Act, 1872, the commissioners remained the sanitary authority within the whole of the commissioners' district, or whether their jurisdiction within that portion of the commissioners' district lying outside the parish of Rushall was transferred to the town council; if the commissioners remained the sanitary authority throughout the whole district, of course their powers as to rating, and the limitations thereto would continue to exist unimpaired; but if they did not remain the sanitary authority within that portion, and if their jurisdiction over it passed to the town council, nevertheless only their powers and the limitations thereto were transferred to the town council. This result seems to me to follows from the language of the Public Health Act, 1872, s. 7, as explained by the Sanitary Law Amendment Act, 1874, s. 3. The last-named enactment declares that "all the powers, rights, duties, capacities, liabilities, and obligations of any authority having jurisdiction under a local Act in the district of an urban sanitary authority" in 1872 were (not altered but) "were transferred to and became attached to the urban sanitary authority." In this view consequently all the powers of the commissioners within that portion of the commissioners' district lying outside the parish of Rushall were transferred to and became attached to the town council; nevertheless, as merely the powers of commissioners were transferred, the town council after the transfer could only make an improvement rate in order to meet sanitary expenses, and that rate with respect to a railway was subject to the limitation for which the prosecutors contend. If this be the correct view, the state of matters within the old borough of Walsall, from 1872 and 1875, was as follows: the town council was still invested with power to make the borough rate applicable to the purposes of the borough fund under the provisions of the Municipal Corporations Acts, and they were the sanitary authority throughout the whole of the old borough. With regard to those parts of the old borough which were not within the commissioners' district, the town council were the sanitary

(1) Ante, 147, n.

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authority under the Public Health Act, 1872, s. 4, without reference to the Walsall Improvement and Market Act, 1848, and within these parts of the old borough they would have the power of a sanitary authority not circumscribed by the local Act; but as to that part of the old borough which lay within the commissioners' district, and which was the more populous portion, and therefore the portion in respect of which the sanitary expenses were larger, although the town council were the sanitary authority, yet under the Sanitary Law Amendment Act, 1874, s. 3, only the limited powers of the commissioners were transferred to them; therefore the town council in this part of the old borough could, in respect of sanitary purposes, make only an improvement rate; and it follows that although the borough rate was levied throughout the whole of the old borough for municipal purposes, yet it was chargeable only with the sanitary expenses incurred in those parts not lying within the commissioners' district, and that in the rest of the area of the old borough an improvement rate was to be raised and applied by the town council for sanitary purposes. It is obvious that whilst matters stood in this condition, very great difficulties must have occurred in the management of the rates, and at one time it seemed to me a forcible argument that these difficulties, being almost insurmountable, ought not to be assumed to have been intended by the legislature, and therefore that we ought to put such a construction upon the statutes as would remove them; but upon consideration I am of opinion that the Public Health Act, 1872, s. 33 (1), gives the key to the scheme of the Act. Sect. 43 also is of importance, because it appears to recognise the continuance of rating powers under local Acts; but to my mind the importance of s. 33 consists in this, that it seems to furnish a

(1) By the Public Health Act, 1872 (35 & 36 Vict. c. 79), s. 33: "the local government board may, on the application of the sanitary authority of any district, by provisional order, wholly or partially repeal, alter, or amend any local Acts, other than Acts for the conservancy of rivers, in force in such district, and not conferring powers or privileges upon corporations, companies, undertakers, or individuals for their own pecuniary benefit, which relate to the same subject matters as the sanitary Acts."

Sect. 43: "Any limit imposed on or in respect of any rate by any local Act of Parliament shall not apply to any rate required to be levied for the purpose of defraying any expenses incurred by a sanitary authority for sanitary purposes."

mode, by which the difficulties that I have mentioned might have been met. Sect. 33 gave power to the local government board to interfere, and if an application had been made by the town council, and it had been shewn that whilst the Walsall Improvement and Market Act, 1848, should be in force, it was almost impossible for the town council to provide for the sanitary expenses of the borough, the local government board might have repealed, altered, or amended that Act; but if they had repealed it, justice would have required that they should repeal it on terms. At all events a power existed which might have afforded a remedy, but that power was never called into play: no doubt the difficulties existed, but they might have been met.

As it seems to me, this was the state of affairs in the borough up to 1875. It has been admitted that the contention for the prosecutors is correct, unless the old borough of Walsall was a district falling within the first exception to the Public Health Act, 1875, s. 207; if it is not, it comes within the general enactment at the beginning of that section, and all expenses incurred or payable by the town council in the execution of that Act are to to be charged on and defrayed out of the district fund and general district rate. To my mind the circumstances necessary to bring the old borough within the first exception to s. 207 are wanting, and therefore all sanitary expenses must be paid out of the general district rate to be levied according to the provisions of that statute.

After the Public Health Act, 1875, was passed, the state of affairs in the old borough of Walsall was as follows: the town council was the only sanitary authority, and under the Municipal Corporations Acts was the municipal authority for the whole of the old borough: they could levy a borough rate for municipal purposes; but in every part of the old borough they were bound to pay all the expenses incurred by them in the execution of the Public Health Act, 1875, out of the district fund; that is to say, they were bound to make a general district rate upon the whole of the old borough in respect of sanitary expenses incurred in every part of it, and by s. 211 in making a general district rate a limitation existed with respect to railways. Therefore, so far as relates to the Public Health Act, 1875, it seems to me that the

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borough rate of December, 1876, was bad, and in strict law ought to be quashed, and that there ought to have been in respect of all sanitary purposes a general district rate, and that under that district rate the railway of the prosecutors in respect of its whole length in the old borough was liable to be assessed at only one-fourth of its annual value.

Then came the local Act of 1876, which added to the old borough the portion of the commissioners' district lying within the parish of Rushall. I do not think that any of the sections of that statute affect the principle upon which we have to decide the present case; but after that statute had been passed, that portion of the commissioners' district became subject to the same regulations as existed in the old borough; and it follows that throughout the whole of the extended borough the town council are the sanitary authority and are required to make a general district rate, out of which the sanitary expenses of the whole of the extended borough must be paid.

I think that the judgment of the Queen's Bench Division is right for the reasons assigned by the judges who decided *Reg.* v. *London and North Western Ry. Co.* (1)

COTTON, L.J. By arrangement between the parties the question which we have to consider, is, at what amount the railway of the prosecutors ought to be assessed; but for that arrangement the question would have been, whether the rate made in December, 1876, was bad in consequence of its having been made for the purpose of providing for, amongst others, expenses incurred under the Public Health Act, 1875. The question before us really depends upon certain sections of that Act. Sect. 207 begins with a general direction how expenses incurred in the execution of that Act should be met; it provides that they shall be defrayed out of the district fund and general district rate; the mode of forming the fund is pointed out in s. 209, and of levying the rate in ss. 210, 211. A railway is assessed to a general district rate at one-fourth of its value, whereas the line of the prosecutors is assessed at its full value to the borough rate in dispute. It was contended for the defendants that the borough of Walsall comes within the first

(1) Ante, 147, n.

exception to s. 207; but in my opinion that exception does not apply, unless the expenses incurred for sanitary purposes as an entirety were at the time, when the Public Health Act, 1875, came into operation, payable out of the borough fund; it is not material how they were actually paid; the question is how they ought to have been paid. A very material statute for our consideration is the Public Health Act, 1872; but it is necessary to go back to the Walsall Improvement and Market Act, 1848, which gave the commissioners powers for certain sanitary purposes and authorized them to execute certain works; and for the purpose of defraying the expenses incurred in carrying out the Act the commissioners were authorized to levy an improvement rate, in which a railway was to be assessed at only one-fourth part of its value. The district, over which the commissioners had jurisdiction, was situate partly within and partly without the borough. This Act undoubtedly remained in force until 1872, and the commissioners appointed under it were the persons empowered to construct sanitary works, and the improvement rate was the only means at their command for meeting the expenses of their operations. I now come to the Public Health Act, 1872. Up to the date of this Act it is clear that within the commissioners' district as regarded rating for sanitary purposes a railway company was entitled to a partial exemption, that is, they were liable to be rated at only one-fourth of the net value of their line. The burden of proof lies upon those who contend that between 1872 and 1875 this reduction in the rateable value was taken away; they must shew how it has come to pass that although previously to 1872 the railway company were as regarded the entirety of the commissioners' district liable only to an improvement rate on one-fourth only of the value of their line, the company upon the passing of the Public Health Act, 1872, became within a portion of that district liable to be assessed at the full value of their line. The effect of the Public Health Act, 1872, I understand to be this: it constituted the town council the urban sanitary authority for the whole of the old borough, including that part of the commissioners' district lying within it, and it transferred to and vested in the town council the powers of the commissioners previously exercised by them over that portion of their district, which was thus brought under

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the jurisdiction of the town council. The Public Health Act, 1872, certainly did not altogether put an end to the powers of the commissioners, for under s. 4, sub-s. 2, their jurisdiction was to continue over that portion of their district which was not transferred, namely, that lying within the parish of Rushall. Sect. 7 of the Public Health Act, 1872, as interpreted by s. 3 of the Sanitary Law Amendment Act, 1874, did not enact that the powers given to an urban sanitary authority should be similar to those conferred upon a previously existing authority; but it in effect provided that the powers and duties of improvement commissioners should be transferred to the urban sanitary authority constituted by s. 4. According to my interpretation of these Acts the commissioners, after the passing of the Public Health Act, 1872, were not themselves to exercise their previously existing powers within that portion of their district lying inside the old borough, but their powers over it were transferred to and vested in the new urban sanitary authority, that is, the town council, which took those powers with all the limitations annexed to them, so that when the town council obtained control over a portion of the district formerly subject to the jurisdiction of the commissioners, they took it subject to the limitation upon the power of rating which had previously existed in favour of railway companies, who were entitled to be assessed at one-fourth only of the net value of their line. I do not think that any provision in either s. 7 of the Public Health Act, 1872, or s. 3 of the Sanitary Law Amendment Act, 1874, took away the partial exemption of railway companies.

The defendants relied also on s. 16 of the Public Health Act, 1872; the proviso in that section is not easy to construe; but it is a rule of construction that when a particular benefit has been given by statute to a person, he is not to be deprived of that benefit except by clear words in a subsequent statute; and I think it a reasonable interpretation of this proviso, that it enacted that where there had been a body exercising sanitary powers and providing for its expenses by means of a rate other than the borough rate, that rate should continue to be levied, and all the expenses formerly paid out of it should still be chargeable upon it. If the proviso is read literally, it is difficult to give to it any application; for the urban sanitary authority did not exist before the Public

Health Act, 1872; it was a creation of that statute; and by enacting the proviso the legislature evidently intended that the urban sanitary authority should continue to levy the same rates for sanitary purposes in those districts, in which they had been previously levied.

This state of matters existed down to the passing of the Public Health Act, 1875, and at that time within that part of the old borough which lay within the commissioners' district there was an obligation to pay, not out of the borough rate, but out of another rate, such expenses as might have been lawfully incurred under the Walsall Improvement and Market Act, 1848. These expenses could not have been paid out of the borough rate, unless the partial exemption of the railway company had been taken away, because the company must have been assessed to the borough rate at the full value of their line. I have stated my reasons for thinking that in 1875 this exemption still existed; and if I am right in my view, it follows that at the passing of the Public Health Act, 1875, the expenses incurred by the town council in the execution of the sanitary Acts were not payable out of the borough rate. After the passing of the Public Health Act, 1875, the railway company continued to be entitled to claim a partial exemption from assessment as to rates for sanitary purposes. They were therefore liable to be assessed for these purposes only to a general district rate, in which pursuant to s. 211 they can be assessed at only one-fourth of the net annual value of their line. The borough rate of the 1st of December, 1876, was made to defray, amongst others, sanitary expenses; as the company was necessarily assessed to it at the full value of their line, this borough rate was bad and might have been quashed; but by agreement between the parties we have only to decide in what proportion the company are to be assessed; and our answer must be that for sanitary purposes they are to be assessed at one-fourth of the full rateable value of their line.

Judgment affirmed.

Solicitor for prosecutors: *R. F. Roberts.*

Solicitors for defendants: *Sharpe, Parkers, Pritchard, & Sharpe, for Wilkinson & Gillespie, Walsall.*

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Dec. 21.

[IN THE COURT OF APPEAL.]

ANGUS & CO. *v* DALTON AND THE COMMISSIONERS OF HER MAJESTY'S WORKS AND PUBLIC BUILDINGS.

Lateral Support of House by adjoining Soil—Twenty Years' uninterrupted Enjoyment without Grant by adjoining Owner—Presumption of Grant made and lost in Modern Times—Prescription Act (2 & 3 *Wm.* 4, *c.* 71)—*Employer and Contractor—Liability of Employer for Injury caused to neighbouring Property by the Execution of Work dangerous in its Nature.*

4 C P D 174
11 Ch D 864, 864
12 Ch D 220 — 264
14 Ch D 537
5 C P D 392
19 Ch 285

The right to the support of a building by the adjacent soil of an adjacent owner is not a natural right of property; it is an easement which may be acquired by prescription from the time of legal memory, or by grant express or implied, but it is not an easement within the Prescription Act (2 & 3 Wm. 4, c. 71.) It may also be acquired by the circumstance that the building has stood for twenty years, if during that period the owner of the adjacent soil knew or might have known that the building was thereby supported, and if he was capable of making a grant; and (by Cotton and Thesiger, L.JJ., as to this Brett, L.J., dissenting) after twenty years' enjoyment in point of fact of the support to the building the claim to it as matter of right will not be defeated by proof that no grant of the easement was ever made.

By Cotton and Thesiger, L.JJ., affirming *Bower* v. *Peate* (1 Q. B. D. 321), where a contractor has been employed to do work which in its nature is dangerous to a neighbouring property and damage results from the work, the employer is liable to compensate the owner of the neighbouring property, although the contractor is competent and he has been directed by the employer to take proper precautions in executing the work.

For more than twenty years before 1849 two dwelling houses of considerable age had stood side by side; in that year one of them was converted into a factory, the internal walls being removed, and the girders, which supported the upper floors of the factory, being let into a large chimney-stack, the foundations of which being in contact with the soil under the adjoining house the lateral pressure upon that soil was materially increased. The owner of the adjoining house did not assent to these alterations. The plaintiffs became possessed of the factory, and after it had stood for twenty-seven years the defendants C. contracted with the defendant D. to pull down the adjoining house and to excavate the soil forming its site. D. employed N. to do the excavations; in consequence of these excavations, which, however, were not done negligently, the foundations of the chimney-stack of the plaintiffs' factory, being deprived of the support of the adjacent soil, gave way. An action having been brought to recover damages for excavating without leaving sufficient support to the chimney-stack, the foregoing facts were proved, but it did not appear that the owner of the house pulled down by the defendants had been aware of the precise nature of the alterations made when the building occupied by the plaintiffs had been converted into a factory, and it was admitted that since the conversion he had not by deed granted any easement of support in respect of

the factory. At the close of the plaintiffs' case, the judge held that the defendants C. and D. were liable for the acts of N., and that as more than twenty years had elapsed since the conversion of the building occupied by the plaintiffs into a factory, it had acquired an absolute right to the support of the adjacent land, whether or not the owner of the house pulled down by the defendants had had notice of the alterations, and that the right of support did not depend upon the implication of a grant, and he directed the jury to find for the plaintiffs:—

Held, by Cotton and Thesiger, L.JJ., overruling the judgment of the majority of the Queen's Bench Division, Brett, L.J., dissenting, that upon these facts the defendants were not entitled to judgment, for the enjoyment during more than twenty years of the support in point of fact raised a presumption that the occupiers of the plaintiffs' factory were entitled thereto as matter of right, and the circumstance that no grant of the easement of support had been made was not material; but that the defendants were entitled to a new trial on the ground that they might rebut the presumption by evidence either that the owner of the house pulled down by the defendants did not know the nature of the alterations made when the building occupied by the plaintiffs was converted into a factory, or that he was incapable of making a grant.

By Brett, L.J., that as it had been admitted that no grant by deed of the right of support for the factory had ever been made, no easement had been acquired from the enjoyment in fact for twenty years of the support of the adjacent soil, and that the defendants were entitled to judgment.

Affirmed by H. of L. 6 App. Ca. 741

APPEAL from the judgment of the Queen's Bench Division in favour of the defendants. (1)

The facts of the case are stated in the judgments of Cockburn, C.J., and Lush, J., delivered in the Court below, and also in the judgments of Brett and Thesiger, L.JJ., hereinafter set forth.

The arguments in this Court are sufficiently noticed in the judgments.

May 20, 21, 23. *Littler, Q.C., G. Bruce,* and *Ridley,* for the plaintiffs.

Sir James Stephen, Q.C., and *A. E. Gathorne-Hardy,* for the Commissioners of Works and Buildings.

Herschell, Q.C., and *Wheeler,* for the defendant Dalton.

In addition to the cases mentioned in the judgments delivered in the Queen's Bench Division and in this Court, the following were cited in the course of the argument; as to whether a newly-built house is entitled to support from adjacent soil: *Slingsby* v.

(1) 3 Q. B. D. 85.

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Barnard (1); whether by twenty years' enjoyment of support an absolute right is gained: *Holcroft* v. *Heel* (2); *Rolle* v. *Whyte* (3); *Jenkins* v. *Harvey* (4); *Tapling* v. *Jones* (5); *Aynsley* v. *Glover* (6); *Harbidge* v. *Warwick* (7); *Suffield* v. *Brown* (8); *Stroyan* v. *Knowles* (9); *Smith* v. *Thackerah* (10); whether the owner of land may negligently do upon his soil an act injurious to his neighbour: *Sutton* v. *Clarke* (11); *Radcliff's Executors* v. *Mayor, &c., of Brooklyn* (12); *Chadwick* v. *Trower* (13); whether the owner of the house pulled down by the defendants had consented to the conversion into a factory by acquiescence: *Hervey* v. *Smith* (14); whether an employer is liable for the default of a contractor: *Gray* v. *Pullen* (15); *Butler* v. *Hunter* (16); *Hole* v. *Sittingbourne Ry. Co.* (17); *Ellis* v. *Sheffield Gas Co.* (18); *Pickard* v. *Smith* (19); *Rapson* v. *Cubitt* (20); *Allen* v. *Hayward* (21); *Reedie* v. *London and North Western Ry. Co.* (22); *Overton* v. *Freeman* (23); *Peachey* v. *Rowland.* (24)

Cur. adv. vult.

Dec. 21. The following judgments were delivered:—

THESIGER, L.J. The material facts of this case may be shortly stated. Down to the year 1849 two dwelling-houses of considerable age stood side by side, each having had in fact for a period long exceeding twenty years lateral support from the soil, upon which the other house rested. In 1849 the plaintiffs' predecessor converted one of the dwelling-houses into a coach-factory. In the course of the conversion the internal walls, which had previously existed, were removed, and girders supporting the upper floors of

(1) 1 Roll. Rep. 430.
(2) 1 B. & P. 400.
(3) Law Rep. 3 Q. B. 286.
(4) 1 C. M. & R. 877.
(5) 11 H. L. C. 290.
(6) Law Rep. 10 Ch. 283.
(7) 3 Ex. 552.
(8) 33 L. J. (Ch.) 249.
(9) 6 H. & N. 454.
(10) Law Rep. 1 C. P. 564.
(11) 6 Taunt. 29.
(12) 4 New York Rep. Co. of Ap. (Comstock) 195.
(13) 6 Bing. N. C. 1.
(14) 22 Beav. 299.
(15) 5 B. & S. 970; 34 L. J. (Q.B.) 265.
(16) 7 H. & N. 826; 31 L. J. (Ex.) 214.
(17) 6 H. & N. 488; 30 L. J. (Ex.) 81.
(18) 2 E. & B. 767; 23 L. J. (Q.B.) 42.
(19) 10 C. B. (N.S.) 470.
(20) 9 M. & W. 710.
(21) 7 Q. B. 960.
(22) 4 Ex. 244.
(23) 11 C. B. 867; 21 L. J. (C.P.) 52.
(24) 13 C. B. 182; 22 L. J. (C.P.) 81.

the factory were on one side let into a large chimney-stack, which extended along a portion of the dividing wall, and on the opposite side took their bearings from the plaintiffs' wall. The effect of this mode of construction was to throw a considerable part, estimated at one-fourth, of the whole weight of the factory upon the chimney-stack, the foundations of which being in contact with the soil under the adjoining house the lateral pressure upon that soil was materially increased. No express assent to the alteration was given by the owner of the adjoining house, but it must be taken that he was aware of the conversion of the dwelling-house into a factory, although there is no evidence of his having been aware of the precise nature of the internal alterations made for that purpose, or of the exact effect which they would produce as regards lateral pressure. The adjoining house continued in its condition of a dwelling-house until shortly before the commencement of the present action, when the Commissioners of her Majesty's Works and Public Buildings became possessed of it, and by a contract with the defendant Dalton, a builder, engaged him to pull it down, to excavate to such a depth as would enable cellarage, which had not previously existed, to be made, and to erect upon the site of the old house a building to be used as a probate office. Under the specification, which was incorporated with the contract, Dalton was bound to shore up adjoining buildings and to make good all damage caused thereto during the erection of the building, and to provide three rods of brickwork in Portland cement, to be used, if necessary, in underpinning the adjoining property. Dalton employed Messrs. Newby & Thorpe, as sub-contractors, to do the whole of the excavators', drainers', bricklayers', and masons' work on the building under conditions, which may be assumed to have included those to which I have referred. They therefore excavated to the depth of several feet below the level of the foundation of the plaintiffs' chimney-stack, and notwithstanding that they left a thick pillar of the original clay around the stack for the purpose of supporting it during the erection of the new dividing wall, the clay gave way after exposure to the air and the stack sank and fell, carrying with it a considerable portion of the factory, and causing damage to the plaintiffs, in respect of which the present action was brought. The case came on

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for trial before Lush, J., and a special jury, when, in addition to proof of the above-mentioned facts, the plaintiffs' witnesses gave detailed evidence as to the construction of the factory and the weight thrown upon the chimney-stack, the fair inferences from which evidence appear to me to be that the construction of the plaintiffs' factory, although somewhat unusual, was such as to make it reasonably stable, and that looking to the character of the building, and the purposes for which it was erected, the weight imposed upon the chimney-stack, although greater than if there had been internal walls, was not unduly great. The cross-examination of the plaintiffs' witnesses was obviously directed to displacing the plaintiffs' case upon these points, and at the close of the plaintiffs' case it was submitted on the part of the defendants that no right to support for the chimney-stack with the weight upon it had been obtained, or that at least it was a question for the jury whether the weight, which was thereby put upon the adjoining soil, was of such a character as the neighbouring owner could reasonably be expected to be aware of and to provide for. It was contended also on the part of the commissioners that Dalton, the builder, being a contractor and not a servant or agent to them, was alone liable, while Dalton took the same point as regards his sub-contractors. Upon this point the learned judge held that he was bound by the authority of *Bower* v. *Peate* (1) to hold both the commissioners and Dalton responsible for the acts of the sub-contractors; and upon the main question he ruled, as I gather from the shorthand writer's notes of the trial, that where a building has stood twenty years it has acquired an absolute right to the support of the adjacent land, without any reference to the question whether the adjoining owner has had notice of the alterations of structure and of the additional weight thereby imposed, and that such right is not dependent upon the implication of a grant. In accordance with his ruling he directed a verdict for the plaintiffs, leaving them to move for judgment.

Upon motion for judgment the case was argued in the Divisional Court of Queen's Bench, before Cockburn, C.J., Mellor and Lush, JJ., and while Lush, J., adhered in substance to the view of

(1) 1 Q. B. D. 321.

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the case which he had taken at the trial, the other members of the Court held that the facts proved shewed no right of support, and directed the judgment to be entered for the defendants. Against this judgment the present appeal was brought. The principal question raised by it is of unusual difficulty as well as of great importance, and looking to the difference of opinion, which unfortunately exists upon it in this Court as well as in the Court below, I cannot but feel diffident as to the correctness of the conclusion at which I have arrived. If, indeed, that question had been wholly untouched by authority, I should have felt the greatest hesitation in forming an opinion upon it, for in every aspect in which it presents itself it discloses difficulties which render a satisfactory solution almost impossible. Although, however, the exact point for decision in this case may not have been covered by direct authority, the dicta of judges upon it are to be found in a large number of cases in which analogous points have formed the subject of distinct decision, and it is, I think, possible to obtain from these dicta and decisions valuable assistance in determining what is the nature of a right of support such as is claimed in the present case, and under what circumstances it may be acquired.

The right to lateral support of buildings from adjoining soil holds an intermediate place between the right to lateral support of soil from soil, and the right of lateral support of buildings from buildings; and some light may be thrown upon this case by consideration of these kindred rights.

The right to support of soil from soil is a right of property which requires neither prescription nor grant for its acquisition, and which naturally exists wherever the lands of adjoining owners are in contact: *Humphries* v. *Brogden* (1); *Rowbotham* v. *Wilson*. (2)

The right to support of buildings from buildings, on the other hand, is an easement of a highly artificial character, and one which must necessarily be of infrequent occurrence. Properly constructed houses do not, as a rule, depend for their stability upon the existence of adjoining houses. No man can, therefore, from the mere existence in fact of this dependence, be presumed

(1) 12 Q. B. 739. (2) 8 E. & B. 123. 3 Jur. N. S. 1297.

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to have notice of it, and as a consequence be presumed, in the event of his not interrupting it, to acquiesce in his neighbour's enjoyment of it. Such enjoyment offends against one of the cardinal rules governing the acquisition of an easement, namely, that the user must not be secret. But although the general rule be as I have stated, still, so far as there is authority upon this point at all, it would appear to have been the opinion of the Courts that the easement in question might, under special circumstances, be acquired. The decision in *Peyton* v. *Mayor of London* (1) turned in great measure upon the form of the declaration, which, as Lord Tenterden said, neither alleged as a fact that the plaintiffs were entitled to have their house supported by the defendants' house, nor contained any allegation from which a title to such support could be inferred as a matter of law; but the concluding passage of the judgment in that case, in which the Court adverted to the want of evidence, from which a grant to the plaintiffs of a right to the support of the adjoining house might be inferred, as well as to the form of the declaration, leads fairly to the conclusion that upon stronger evidence directed to a more properly drawn declaration a grant of the right of support claimed might have been presumed. In *Solomon* v. *Vintners' Company* (2), which was a case in which the right of support for a house from another house not immediately adjoining was claimed, Pollock, C.B., in giving the judgment of himself and two other judges, although apparently not favourably disposed towards such a right under any circumstances, yet admitted that, if the house removed had been next adjoining the plaintiff's, he would have been much embarrassed by cases and dicta in arriving at a decision against the right claimed. Bramwell, B., was careful to rest his judgment against the particular claim made on the ground that, upon the facts proved, the enjoyment was not open. *Richards* v. *Rose* (3) was the case of houses originally built together and belonging to the same owner, and there the Court presumed that upon the severance of the ownership there was a grant and a reservation of the reciprocal right of support. These cases, then, at least indicate that even in the case of a claim to the purely artificial support

(1) 9 B. & C. 725, at p. 736.

(2) 4 H. & N. 585.

(3) 9 Ex. 218.

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of building by building, the reason against presuming a right upon evidence of mere user is rather the particular one derived from the nature of the easement claimed, and the consequent improbability of knowledge and acquiescence on the part of the owner of the servient tenement, than a general one founded upon the impossibility of such an easement being acquired by user at all.

I come now to the consideration of the easement, which is claimed in the present case. It holds, as I have said, an intermediate place between the artificial right, to which I have just referred, and the natural right of property, by which a man is entitled to have his soil supported laterally by his neighbour's soil. It has an affinity to this natural right, if the means of support be looked at; it is more akin to the artificial right, if the object of the support be considered. I have applied the term "easement" to the right claimed in this action, because it is clear that the support of a building cannot be claimed as a natural right of property. Natural rights of property must be rights which attach to property in its primitive state, and cannot, without a contradiction in terms, be applied to an artificial subject-matter like a house; but I need not stop to reason this out, for the judgment of the Exchequer Chamber delivered by Willes, J., in *Bonomi* v. *Backhouse* (1), following what had previously been laid down in *Wyatt* v. *Harrison* (2), *Partridge* v. *Scott* (3), and other cases, distinctly affirms the proposition that the right to support of buildings must be founded upon prescription, or grant express or implied. It is true that when *Bonomi* v. *Backhouse* (4) came upon appeal to the House of Lords, two members of that House, viz. Lords Cranworth and Wensleydale, used expressions to the effect that the right claimed in that case was not an easement, but a right of the plaintiffs to the enjoyment of their own property, and the language of Wightman, J., in the Court of Queen's Bench was to the same effect. In no part, however, of the opinions and judgment referred to was it suggested that the decisions in previous cases upon this point were erroneous, and the language used may be reasonably attributed to the fact that

(1) E. B. & E. 646, at p. 654.
(2) 3 B. & Ad. 871.
(3) 3 M. & W. 221.
(4) 9 H. L. C. 503.

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while damage to the plaintiff's buildings constituted the damage in respect of which the action was brought, it was caused by mining operations, which had affected the soil upon which the plaintiff's buildings stood, quite apart from the additional weight which they imposed upon it; in other words, that the natural right of property had been invaded. The Lord Chancellor and Lord Brougham accepted the reasons, as well as concurred with the judgment, of the Exchequer Chamber.

If then the right claimed be not a right of property, is it an easement which can be acquired; and if it can, how and under what circumstances may it be acquired? That it is a right or easement, which may under some circumstances be acquired, is treated as clear law by a long series of authorities and is admitted by all the judgments in the Court below: that it is an easement not coming within the Prescription Act appears also to be generally admitted, and is assumed by me: that it is a right or easement, which must be founded upon "prescription or grant express or implied" is a proposition stated in terms already quoted in the judgment of the Court of Exchequer Chamber in *Bonomi* v. *Backhouse* (1), and borne out by the general current of authority upon the subject of the acquisition of easements. I cannot therefore accede to the view suggested by Lush, J., in the Court below that an absolute right to an easement uninterruptedly enjoyed for twenty years may be obtained by analogy to the period of limitation fixed as regards entry on lands by 21 Jac. 1, c. 16. It may be that the commencement of the reign of Richard I. was originally fixed as the period of prescription for incorporeal rights by analogy to the statute 3 Edw. 1, c. 39, which fixed the same period for alleging seisin in a real action, and there are dicta to be found in the books supporting the view that as a matter of theoretical law the same analogy carried with it an alteration as regards incorporeal rights, when the period of sixty years was fixed for a writ of right, and fifty years for a possessory action by 32 Hen. 8. But, as a matter of practical law, this analogy does not appear to have been extended by the courts to these last-mentioned statutes. The reign of Richard I. still remained the time, to which legal memory in regard to easements was supposed to relate, and

(1) E. B. & E. 646, at p. 655.

although the later statute of 21 Jac. 1, c. 16, did undoubtedly suggest to the minds of the judges the propriety of giving to twenty years' uninterrupted enjoyment of incorporeal rights an effect to some extent at least commensurate with that produced by a similar enjoyment of land, they seem to have been unwilling, probably for good reasons, to go the whole length of applying the statute by analogy, notwithstanding that if they had done so they would have followed the example set them by their predecessors in respect of the statute of Edward I. They effected the object which they had in view by the creation of the fiction of a grant made and lost in modern times. Such a fiction, like other fictions, may be open to the strictures passed upon it, although, I must add, that it has had in my opinion in many respects a beneficial operation, and is, after all, but an extension of the fiction, which had previously formed the basis of prescriptive titles, for every prescription imports a grant which in most cases no one believes in. But whatever may be the merits or demerits of the fiction, it is too late to question the validity of its introduction. The doctrine of lost grant forms part of the law of the land, and any dislike which may be felt for this and like fictions cannot be allowed to interfere with the carrying out of the doctrines involved in them to the full extent, which has been sanctioned by established authority. It becomes necessary therefore, in the first place, to consider the character and extent of the presumption of a lost grant as applicable to easements generally, and then, in the second place, to see in what respects, if any, a difference exists in regard to the particular easement claimed in this action.

And, first, as regards easements generally, the authorities cited in the Court below establish that this presumption is not a "presumptio juris et de jure," or, to use other language, is not an absolute and conclusive bar. On the other hand, these same authorities lay down that the uninterrupted enjoyment of an easement for twenty years raises, to use the words of Lord Mansfield in *Darwin* v. *Upton* (1), "such decisive presumption of a right by grant or otherwise, that unless contradicted or explained the jury ought to believe it:" and the corollary upon this proposition is stated by Bayley, J., in *Cross* v. *Lewis* (2), where he says: "I do

(1) 2 Wm.'s Notes to Saund. 506. (2) 2 B. & C. 686.

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not say that twenty years' possession confers a legal right; but uninterrupted possession for twenty years raises a presumption of right; and ever since the decision in *Darwin* v. *Upton* (1) it has been held that in the absence of any evidence to rebut the presumption, a jury should be told to act upon it." What then is the nature of the evidence which would be held to "contradict," "explain," or "rebut" this decisive presumption? Proof of the mere origin of the easement within the period of legal memory is not sufficient for this purpose: it was to meet the hardship, which arose from such proof preventing the acquisition of a prescriptive title, that the legal fiction of a grant made and lost in modern times was invented; neither is it sufficient to prove such circumstances as negative an actual assent on the part of the servient owner to the enjoyment of the easement claimed, or even evidence of dissent short of actual interruption or obstruction to the enjoyment: see *Cross* v. *Lewis* (2), where Bayley, J., speaking of the case of opening windows says: "If his neighbour objects to them, he may put up an obstruction, but that is his only remedy, and if he allows them to remain unobstructed for twenty years, that is a sufficient foundation for the presumption of an agreement not to obstruct them." Again proof, that the dominant and servient tenement were originally in one ownership, and were separated under such circumstances as to negative the presumption of any reservation or grant of the easement claimed having actually been made at the time of the separation, would not be sufficient to prevent the presumption arising in a case where the enjoyment has been uninterrupted for twenty years: see *Livett* v. *Wilson* (3), where, although it was proved that the two tenements were separated by a deed containing no grant or reservation of the easement claimed, the Court did not rely upon this fact as supporting the verdict of the jury negativing the presumption of a lost deed, but took as their ground the contested character of the user. In harmony, as it appears to me, with the last proposition, is the further proposition, that the presumption cannot be rebutted by mere proof by the owner of the servient tenement, that no grant was in fact made either at the commencement or during the continuance of the

(1) 2 Wm.'s Notes to Saund. 506. (2) 2 B. & C. 686, at p. 689.
(3) 3 Bing. 115.

enjoyment. I am not aware that this proposition has been in terms directly decided, but it is almost impossible to suppose that among the numerous cases in which easements have been held by the courts to have been acquired by uninterrupted user for twenty years only, there must not have been many in which the owner of the servient tenement at the time when the period commenced was alive when the action was tried to contradict, if such evidence had been admissible, the fact of a grant; and if such evidence were admissible, it is almost inconceivable that in the numerous cases, in which questions of easements have been discussed, no trace of an opinion to that effect should be found in the observations of the judges. The correct view upon this point I take to be, that the presumption of acquiescence and the fiction of an agreement or grant deduced therefrom in a case, where enjoyment of an easement has been for a sufficient period uninterrupted, is in the nature of an estoppel by conduct, which, while it is not conclusive so far as to prevent denial or explanation of the conduct, presents a bar to any simple denial of the fact, which is merely the legal inference drawn from the conduct. If, instead of its being a mere legal inference, the courts had considered that it was an inference of fact to be drawn by juries like other inferences of fact, and in respect of which the servient owner might be called as a witness to negative the fact by denial of a grant ever having been made, it is difficult to understand how judges could have systematically, as the Lord Chief Justice admits they did, directed juries to find grants "in cases in which no one had the faintest belief that any grant had ever existed, and where the presumption was known to be a mere fiction." (1) The case of *Campbell* v. *Wilson* (2) lends support to my view upon this point, and illustrates to some extent my meaning when I speak of explanation of the conduct, which is relied upon as leading to the presumption of a grant. There, under an award made twenty-seven years before action, all rights of way in a particular locality, except those set out in the award, of which the way in dispute in the action was not one, had been extinguished. The facts of the case pointed so strongly to the use of the way in question having originated in a mistaken acting under the award, that the judge in his summing up almost

(1) 3 Q. B. D. 105.

(2) 3 East, 294.

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assumed the fact; but, having ruled also, that notwithstanding it the proof of subsequent user as of right was sufficient to raise the presumption of a grant, and the jury having found in favour of the defendant, who claimed the way, the Court supported both the ruling and the finding; and Le Blanc, J., said: "Unless the jury could, in the words of the report, refer the enjoyment for so long a time to leave, favour, or otherwise than under a claim or assertion of right, and indeed, unless it could be referred to something else than adverse possession, I think such length of enjoyment is so strong evidence of a right, that the jury should not be directed to consider small circumstances as founding a presumption that it arose otherwise than by grant." The direction of the Lord Chief Justice himself to the jury in the case of *Rogers* v. *Taylor* (1), to which I shall have to refer again, still further supports my view. But while the cases, which I have cited, throw light upon the point, as to what circumstances will not negative the presumption of a grant arising from uninterrupted enjoyment for twenty years, still further light is thrown upon the subject by a consideration of cases cited in the Court below, in which the presumption was held to have been properly rebutted. The case of *Barker* v. *Richardson* (2) was one in which the owner of the servient tenement, a rector, tenant for life, was incompetent to make a grant, and it was held therefore that a grant by him could not be presumed. In *Webb* v. *Bird* (3), which was the case of a claim, as stated in the declaration, to the enjoyment as of right of the "benefit and advantage of the streams and currents of air and wind which had used to pass, run, and flow from the west unto a windmill," and which enjoyment was alleged to have been interrupted by the building of a school-house twenty-five yards to the west of the windmill, Wightman, J., in delivering the judgment of the Court of Exchequer Chamber, said as follows (4): "In the present case it would be practically so difficult, even if not absolutely impossible, to interfere with or prevent the exercise of the right claimed, subject, as it must be, to so much variation and uncertainty, as pointed out in the judgment below, that we think it clear that no presumption of a grant, or easement in the nature of a grant, can

(1) 2 H. & N. 828.
(2) 4 B. & A. 579.
(3) 13 C. B. (N.S.) 841.
(4) Page 843.

be raised from the non-interruption of the exercise of what is called a right by the person against whom it is claimed, as a non-interruption by one who might prevent or interrupt it." Again, in *Chasemore* v. *Richards* (1), a claim was made to underground water, which merely percolated through the strata in no known channels, and it was held by the House of Lords that the claim could not be supported as a right of property, and that looking to the casual and uncertain, as well as secret character of the enjoyment of such water, no grant of an easement could be presumed.

These cases, therefore, as direct authorities go no further than to shew that a legal incompetence as regards the owner of the servient tenement to grant an easement, or a physical incapacity of being obstructed as regards the easement itself, or an uncertainty and secrecy of enjoyment putting it out of the category of all ordinary known easements, will prevent the presumption of an easement by lost grant; and on the other hand indirectly, they tend to support the view, that as a general rule where no such legal incompetence, physical incapacity, or peculiarity of enjoyment, as was shewn in those cases, exists, uninterrupted and unexplained user will raise the presumption of a grant, upon the principle expressed by the maxim, "Qui non prohibet quod prohibere potest assentire videtur."

This maxim brings me, secondly, to the consideration, whether the easement of lateral support for buildings from adjoining soil differs, and if so, in what respects, from easements generally, and whether different principles or presumptions of law are to be applied to it. It is said by the Lord Chief Justice that this particular easement is one, the enjoyment of which it is practically impossible to resist. If that be so, then the maxim I have just quoted does not apply, and the proper inference would be that the easement comes within the authority of the cases of *Webb* v. *Bird* (2), and *Chasemore* v. *Richards* (1), and cannot by any period of user, however long, be acquired; but the Lord Chief Justice does not go so far as this: his language upon the point is as follows: (3) "I am very far from saying that when houses or

(1) 7 H. L. C. 349. (2) 13 C. B. (N.S.) 841.
(3) 3 Q. B. D. 116.

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buildings have stood for many years, especially when they appear to be of equal age, the presumption of a reciprocal easement of lateral support ought not to be made. It may reasonably be inferred that they were built under any of the circumstances, from which, at the present time, a grant would properly be implied. Thus they may have been built by one owner, or under a common building lease, or if built by different owners, where some arrangement for mutual support was come to. Thus, had the plaintiffs' premises remained in their original condition, I should have been prepared to make the necessary presumption to uphold the right. Where land has been sold by the owner for the express purpose of being built upon, or, when, from other circumstances, a grant can reasonably be implied, I agree that every presumption should be made and every inference should be drawn in favour of such an easement, short of presuming a grant when it is undoubted that none has ever existed." The Lord Chief Justice appears therefore to place the easement of lateral support for buildings in some special class of its own, and while admitting that the doctrine of a lost grant may be, under certain circumstances, applicable to it, to make its application subject to conditions and limitations other than those which apply to easements generally. Is then the nature of the easement so anomalous as to justify this treatment of it? and even if in its nature it does present anomalous features, are they such as have at any time been considered by the courts to warrant distinctive treatment?

Upon the first of these two questions it may not unreasonably be urged that the physical impossibility of resistance to the enjoyment of the easement, if it exists at all, exists only in cases, where while the servient tenement has to bear the burden of the easement, it at the same time as a dominant tenement enjoys a corresponding benefit; that the tenement, from which support is claimed, must at the commencement of the period of enjoyment be land either in its natural state or built upon; if the former, that there is little, if any more, difficulty in physically resisting the enjoyment of the easement than there would be in obstructing the access of light to windows; if on the other hand the servient tenement be land built upon, that then the easement which the dominant tenement will obtain will be no other in kind than that

which the servient tenement must either have already acquired or be in the course of acquiring. Notwithstanding this reasoning, I am not inclined to dispute that the easement of support for buildings from adjoining soil does possess physical features, which distinguish it materially from most other easements, except perhaps that of the access of light to ancient windows, to which it has a strong analogy; and, if the principles of law relating to easements were now to be settled for the first time, I might be disposed to limit this particular easement of support, and I may add that of light also, by conditions other than those which are applicable to affirmative easements. But the principles of law relating to easements are in the main settled, and the easement most analogous to the one in question here, namely, that of light, is found to be at common law placed as high as, and by the Prescription Act placed even higher than, affirmative easements, although one, the obstruction of which in many cases must be of the greatest practical difficulty. Can it properly be said then, that the difficulty or practical impossibility of obstruction in the case of the easement of support for a building by soil is such as to place it at common law in an entirely different category from other easements, and to render it subject to any real legal distinctions? I think not. This very ground of difficulty and practical impossibility of obstruction was present to the minds of the judges, who took part in the judgment in the Court of Exchequer Chamber in *Webb* v. *Bird* (1), and whilst they decided against the easement claimed in that case on that ground, Blackburn, J., was careful to guard against the supposition, that the reasoning of the judgment extended to the easement of lateral support for buildings. His words were as follows (2): "I perfectly concur in the judgment, but wish, for myself, to guard against its being supposed that anything in the judgment affects the common law right that may be acquired to the access of light and air through a window, or to the right to support by an ancient building from those adjacent. I agree with my Brother Willes, in the Court below, that the case of the right to light, before the statute, stood on a peculiar ground." But the question can only be fully answered by tracing down in a little more detail the authorities upon the

(1) 13 C. B. (N.S.) 841.

(2) Page 844.

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subject. In *Palmer* v. *Fleshees* (1), which was a case of lights, the resolution of the judges put the right of support for an ancient house upon the same footing as the right to ancient lights. The fact alleged by the Lord Chief Justice (2) that the case does not say what length of time will constitute a house or lights "ancient," and does not touch the subject of presumption, does not affect the value of the case upon the point for which I cite it. Again, in *Stansell* v. *Jollard* (3), Lord Ellenborough in terms affirmed in respect of a building, which had stood for twenty years, the right to support, "or as it were of leaning to the adjacent soil," by analogy to the case of lights. It is true that this ruling of Lord Ellenborough was questioned by the Lord Chief Baron Pollock in the case of *Solomon* v. *Vintners' Company*. (4) But the two cases were very dissimilar in their circumstances, and they may well stand together. In *Hide* v. *Thornborough* (5), Parke, B. (afterwards Lord Wensleydale), held at Nisi Prius that where the house of the plaintiff had been supported for twenty years to the knowledge of the defendant, it had acquired a right to the support, and the observations of the same judge in *Gayford* v. *Nicholls* (6) are to the same effect. In *Brown* v. *Windsor* (7), there was evidence of express assent on the part of the owner of the servient tenement to the plaintiff's house being rested upon his wall; but at the same time the judges, who decided the case, appear to have been clearly of opinion that apart from the express assent the acquiescence for twenty-seven years in the enjoyment of the support afforded presumptive proof of the right to the easement claimed. This case, however, was so special in its circumstances as not to afford much assistance upon the point under consideration. The case of *Partridge* v. *Scott* (8) is a more important authority. There a house built more than twenty years before action stood upon land which had been excavated, according to the assumption of the Court, within twenty years; and, if it had not been for the excavation of the land, the mining operation of the defendant on the adjacent soil would not have affected the house. The Court in a considered

(1) Sid. 167.
(2) 3 Q. B. D. 114.
(3) 1 Selw. N. P. 457 (11th ed.)
(4) 4 H. & N. 585.
(5) 2 C. & K. 250.
(6) 9 Ex. 702.
(7) 1 C. & J. 20.
(8) 3 M. & W. 220.

judgment delivered by Alderson, B., decided that the right to lateral support for the house standing as it did upon excavated soil had not been acquired. But the judgment at the same time in substance affirmed these propositions, namely, first, that the house as an ancient house would, but for the excavation of the soil upon which it stood, have acquired an easement of support by virtue of an implied grant; secondly, that, apart from the Prescription Act, such a grant might have been inferred from an enjoyment of the house, although standing upon the excavated soil, for twenty years after the defendants might have been or were fully aware of the facts. The judgment, therefore, seems to assume that, in the case of a house standing upon soil in its ordinary condition, the servient owner has sufficient notice of the fact of support being enjoyed to raise the presumption of acquiescence, and the consequent implication of a grant by him, when the enjoyment has continued for twenty years. *Rogers* v. *Taylor* (1) was a case of subjacent support, in which there had been twenty years' enjoyment of the support, which, however, upon the trial was alleged on the part of the defendants to have been only a contentious enjoyment subject to acts negativing any right of support; the Lord Chief Justice himself, as I have already mentioned, tried the case, and he told the jury that he thought at the end of twenty years after the house had been built the plaintiff would have acquired a right to support, unless in the meantime something had been done to deprive him of it; that the jury must presume that the additional burden was put upon the land by the assent of the owner of the minerals, and must presume a grant by such owner of a right to support. He thereupon left it to the jury to say whether the plaintiff had enjoyed the support for the foundations of his house for twenty years, and the verdict found for the plaintiff upon the direction was upheld by the Court. *Humphries* v. *Brogden* (2) was a case of subjacent support of soil by soil, but the considered judgment of the Court of Queen's Bench, delivered by Lord Campbell, C.J., while affirming the existence of the right as a natural right of property unaffected by a reservation of minerals, went at great length into the analogies to be derived from the principles of law relating to rights of lateral support,

(1) 2 H. & N. 828. (2) 12 Q. B. 739.

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and treated as unquestionable law the proposition, that a right to lateral support of a house by the adjacent soil may be acquired like other easements by twenty years' uninterrupted enjoyment of such support. The language of the judgment upon this point is as follows (1): "Where a house has been supported more than twenty years by land belonging to another proprietor, with his knowledge, and he digs near the foundation of the house, whereby it falls, he is liable to an action at the suit of the owner of the house: *Stansell* v. *Jollard* (2), and *Hide* v. *Thornborough*. (3) Although there may be some difficulty in discovering whence the grant of the easement in respect of the house is to be presumed, as the owner of the adjoining land cannot prevent its being built, and may not be able to disturb the enjoyment of it without the most serious loss or inconvenience to himself, the law favours the preservation of enjoyments acquired by the labour of one man and acquiesced in by another who has the power to interrupt them; and as, on the supposition of a grant, the right to light may be gained from not erecting a wall to obstruct it, the right to support for a new building erected near the extremity of the owner's land may be explained on the same principle." The words "with his knowledge," used in the passage I have quoted, as well as in the ruling of Parke, B., in *Hide* v. *Thornborough* (3), must, I think, be referable to cases like *Partridge* v. *Scott* (4), which is cited in the judgment, and to any other cases, in which the circumstances of a house are of such a special character as to throw without the knowledge of the servient owner a greater than ordinary burden upon his tenement, and cannot be construed to mean that any special knowledge is required in the case of an ordinary house, which must as a matter of course, and to the knowledge of every person, increase by its downward pressure the lateral thrust of the soil upon which it stands. The question of knowledge, however, as affecting the present case is a material one, and will be considered by me more particularly before the close of this judgment. Lastly, comes the case of *Bonomi* v. *Backhouse* (5), the judgments and opinions in which certainly assume the right

(1) Page 749.
(2) 1 Selw. N. P. 457 (11th ed.).
(3) 2 C. & K. 250.
(4) 3 M. & W. 220.
(5) E. B. & E. 646; 9 H. L. C. 503.

of lateral support to a building from adjacent land to stand as high as other easements, if indeed they do not treat it as one more nearly approaching a right of property, and as such more easily to be acquired than an ordinary easement.

The result of the authorities which I have cited is to shew that in the opinion of a large number of judges, ranging over a period of 100 years, from 1761 to 1861, the grant of a right of support for buildings by adjacent soil is one subject to like conditions as, and which may be acquired in like manner with, easements generally by proof of uninterrupted enjoyment for twenty years. Against the consensus of dicta in support of this view no direct authority or even distinct dictum is produced. And under such circumstances I do not feel myself justified, even if I were so disposed, which I am not, in running counter to judicial views so long and so consistently entertained.

But the question still remains whether the right of support acquired by user is an absolute one attaching itself to any house, which has stood the requisite time, or whether any and what limitation is to be put upon the right in this respect. I have already incidentally touched upon this question, and its answer, as it appears to me, is to be found in a reference again to the rule, that a user which is secret raises no presumption of acquiescence on the part of the servient owner, and, as a consequence, no presumption of right in the dominant. If, therefore, a particular house were by reason of some intrinsic or extrinsic weakness of a serious character, or owing to some unreasonable method of construction, to require an amount of support greater than houses of its kind usually require, I think that the mere enjoyment in fact of that extra support would not raise the presumption of acquiescence on the part of the servient owner, or create after twenty years' user a right to that extra support. If, on the other hand, a house is of ordinary stability and of reasonable construction, I think it equally clear that the owner of the adjacent soil must be assumed to know the amount of lateral support, which such a house must need, and is bound to afford it as a matter of right after the house has in fact enjoyed it for twenty years. This question was discussed but not decided in *Dodds* v. *Holme*. (1) In

(1) 1 Ad. & E. 493.

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Partridge v. *Scott* (1) the house was ancient, but the excavation which necessitated the additional support was assumed to be modern, and the judgment therefore in that case is not a direct authority upon the question; but the dictum contained in the judgment, that a grant of the additional support ought not to be inferred from any lapse of time short of twenty years after the defendants might have been or were fully aware of the facts, is a distinct intimation of the opinion of the Court upon the question. If the knowledge on the part of the servient owner is required to make effective the enjoyment of additional support for a house where it is rendered necessary by the soil under it having been excavated, it must equally be required where, by reason of some internal alteration of the house itself, some special support beyond what the general construction and character of the house would indicate becomes necessary.

This, as I have already said, I infer to have been the meaning of Parke, B., in *Hide* v. *Thornborough* (2), and of the Court of Queen's Bench in *Humphreys* v. *Brogden* (3), when they speak of knowledge as a necessary condition of the easement of support. It may be that in the case of the conveyance of one or both of two houses belonging to one owner, each of which is in fact enjoying, by virtue of some peculiarity of construction, a more than ordinary amount of support from the soil of the other, reciprocal grants of the right of support may be presumed without proof of notice or knowledge; but such a case involves different considerations to those which belong to ordinary cases of easements claimed by user, and it appears to me that to hold that a house, whatever be its construction and whatever the amount of support it may need, acquires, merely by twenty years' enjoyment of such support, an absolute right to it, would be to run counter to well-established laws of easements as well as to offend against the principles of reason and justice, on which those laws are founded. Applying, then, these observations to the present case, I cannot concur in the ruling of Lush, J., at the trial, that where a building of any kind has stood for twenty years it has acquired an absolute right of support, without reference to the question of notice to the adjacent

(1) 3 M. & W. 220. (2) 2 C. & K. 250.
(3) 12 Q. B. 739.

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owner; and inasmuch as the effect of that ruling was practically to preclude the counsel for the defendants both from addressing the jury and, if they were so minded, from calling witnesses upon the question of notice, I feel a difficulty in seeing how, under such circumstances, a new trial can be refused to the defendants. But apart from what I hold to be the erroneous ruling of the learned judge, and assuming that his ruling had been founded upon the doctrine of an implied grant, I should still be forced to the conclusion that the defendants are entitled to a new trial. At the close of the plaintiffs' evidence the position of the case stood thus: the plaintiffs' witnesses had proved that the factory was of a construction reasonably stable, but had admitted at the same time that its construction was somewhat unusual. It was clear also that the result of the insertion into the chimney-stack of the girders supporting the upper floors was to concentrate a greater weight at one part of the building than would have been the case, if the girders had, on the side adjoining the defendants' soil, taken their bearings, as they did upon the opposite side, from a dividing wall; and the cross-examination upon this point had raised the issue of the reasonableness of such a method of construction; and lastly, although it was alleged on the part of the plaintiffs that the stack of brickwork would have fallen in consequence of the excavation upon the adjoining soil, without the extra weight of the upper floors of the factory upon it, the counsel for the commissioners distinctly intimated that he was prepared to negative by witnesses that allegation. This being the position in which the case stood, I cannot hold that the jury could be properly directed as a matter of law to presume a grant of the easement claimed upon the footing of its having been enjoyed with the knowledge of the defendants, and, as a consequence, with their acquiescence; and I think that the defendants' counsel were warranted in asking that the jury should determine, whether the weight which had been put upon the adjoining soil was such as the owner of the soil could, under the peculiar circumstances of the case, be reasonably expected to be aware of and to provide for.

One more point remains for consideration, namely, whether assuming the plaintiffs to be entitled to recover for the damages caused by the acts of the sub-contractors, the defendants are

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responsible in law for those acts. Upon that question I entertain no doubt. It is properly admitted by the defendants' counsel that the case of *Bower* v. *Peate* (1) is undistinguishable from the present, and I am of opinion that the law there laid down by the Lord Chief Justice in delivering the considered judgment of the Court is correctly stated and placed upon proper principles, and that the defendants in the present case who have ordered work to be executed, from which in the natural course of things injurious consequences to the plaintiffs' factory might be expected to arise, unless means to prevent them were adopted are, if the plaintiffs are entitled to recover at all, responsible for the damage, which has in fact arisen owing to the means adopted having proved to be insufficient.

For the reasons given I am of opinion that the judgment of the Court below should be reversed, and if the defendants desire it, that the case should go down for a new trial; otherwise that the judgment should be entered for the plaintiffs.

COTTON, L.J. The plaintiffs have no right to recover in the action, unless they are entitled to have from the land, which was excavated, the lateral support required by their house. The majority of the judges in the Queen's Bench Division were of opinion that the plaintiffs under the circumstances had no such right, and the first question is, were they so entitled?

The plaintiffs in the first place contend that every owner of property is entitled independently of user or grant, and as a natural right of property, to have from the soil belonging to adjoining owners such support as any buildings on his own land require: in my opinion this cannot be maintained. In all cases, in which the right of lateral support for buildings has been considered, the judges have with one exception after-mentioned treated the right to lateral support for buildings as one to be acquired by enjoyment or grant, that is, as an easement. This is, I think, the correct view. Every owner of land must from the first have had as a necessary incident a right to the support from his neighbour, which the land in its natural state requires. This is a right, subject to which all property must be taken; but independently

(1) 1 Q. B. D. 321.

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of grant or right acquired by enjoyment, no one can have a right to throw a greater burden on his neighbour by requiring him to support artificial erections. The one exception, to which I have referred to, was *Bonomi* v. *Backhouse* (1), where Lord Cranworth in the House of Lords speaks of the right of the plaintiffs in that case as a right of property. But I think the correct explanation is, that in that case the operations of the defendant would have let down the land of the plaintiffs, even if there had not been any buildings thereon. The right of the plaintiffs to support for their buildings must then be considered as an easement, and the question is whether they have under the circumstances acquired any such right. It is not an easement within the statute 2 & 3 Wm. 4, c. 71. In this I agree with the judges of the Queen's Bench Division. The plaintiffs must therefore make out their right in such way as is available for that purpose independently of the statute.

It was argued for the defendants that the easement was of such a nature that it could not be acquired except by express grant. Although there is not much decision as to the right of support for buildings, the view thus contended for by the defendants is opposed to the opinions expressed by many judges of the highest authority, who all treat the right of lateral support for buildings as capable of being acquired by use or enjoyment. I may refer to the decision of Lord Ellenborough in *Stansell* v. *Jollard* (2), to what is said by Willes, J., in *Bonomi* v. *Backhouse* (3), by Alderson, B., in *Partridge* v. *Scott* (4), by Parke, B., in *Gayford* v. *Nicholls* (5), by Bramwell, B., in *Rowbotham* v. *Wilson* (6), and by Lord Campbell, C.J., in *Humphries* v. *Brogden.* (7) Though in none of these cases is there any express decision of the point, all the judges whom I have named assume that a right to lateral support for buildings is an easement capable of being acquired by any means, by which independently of the Act of 2 & 3 Wm. 4, c. 71, an easement may be acquired. These means are either an enjoyment beyond living memory, from which in the absence of evidence to the contrary enjoyment before the time of legal

(1) 9 H. L. C. 503.
(2) 1 Selw. N. P. p. 457 (11th ed.)
(3) E. B. & E. 655.
(4) 3 M. & W. 220, at p. 228.
(5) 9 Ex. 702, at p. 708.
(6) 8 E. & B. 123, at p. 140.
(7) 12 Q. B. 749.

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memory would be presumed, or by enjoyment for such a time as would be sufficient in the absence of evidence to the contrary to justify a presumption of a modern grant which has been lost. In the present case the building had been for twenty-seven years in the state, in which it was, when the act of the defendants, which is the foundation of the action, was done.

14 C.D. 537

The question of enjoyment beyond the time of living memory does not arise, but there had been upwards of twenty years' enjoyment, and this is sufficient to raise a presumption that the enjoyment has been under a modern lost grant. This is, no doubt, liable to be rebutted, and in my opinion the real question on this part of the case is, what evidence is sufficient to rebut the presumption. On this point there is very little authority, but as stated by Lord Chief Justice Cockburn in this case (1), it is not necessary that the jury should come to the conclusion, that in fact there was such a grant. The easement is analogous to that of a right to light before the statute 2 & 3 Wm. 4, c. 71, and in *Cross* v. *Lewis* (2) Bayley, J., lays it down, and in my opinion correctly, that in such case mere dissent by the owner of the alleged servient tenement will not be sufficient to rebut the presumption. If, therefore, the parties at the trial, as stated by the Lord Chief Justice, admitted that there was not in fact any grant, this, in my opinion, was not sufficient to rebut the presumption arising from twenty years' enjoyment, or to justify a judgment for the defendants. But it may be urged this is contrary to what is said in many cases, namely, that twenty years' enjoyment raises a presumption only, and that the opinion which I have expressed will make such enjoyment confer an absolute right; but this is not so. The presumption may be rebutted by shewing that the owner of the servient tenement was not capable of making a grant, as for instance, that he was tenant for life, or of unsound mind; and the principal case, except *Webb* v. *Bird* (3), and *Chasemore* v. *Richards* (4), referred to by Lord Chief Justice Cockburn, where the presumption arising from twenty years' enjoyment was rebutted, is *Barker* v. *Richardson* (5), where the owner of the alleged

(1) 3 Q. B. D. 105.
(2) 2 B. & C. 686.
(3) 13 C. B. (N.S.) 841.
(4) 7 H. L. C. 349.
(5) 4 B. & A. 579.

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servient tenement was incapable of making a grant. The cases of *Chasemore* v. *Richards* (1), and *Webb* v. *Bird* (2), turned on the peculiar character of the rights claimed, and in the latter case Blackburn, J., expressly distinguished the right then in question from that on which the plaintiffs rely. An admission therefore or evidence, that in fact there was no grant, would not, in my opinion, rebut the presumption, and notwithstanding such evidence or admission, unless there was any other evidence to rebut the presumption (as for instance, evidence that the adjoining owner was incapable of making a grant), the jury ought to be directed to find that there had been a grant which has been lost.

This, however, does not decide the case in favour of the plaintiffs. Enjoyment does not confer a right, unless the enjoyment has been open. Twenty years' enjoyment of lateral support only gives a right to such support as the actual construction of the house, if known to the adjoining owner, requires, or to such support as is reasonably required by a house of the dimensions and construction known or apparent to the adjoining owner. In my opinion, therefore, though on the evidence in this case the jury ought to have been directed to find that the plaintiffs by enjoyment had acquired a right to some support, the question of the degree of support to which they had acquired a right still remained. There was no evidence that the owner of the adjoining house knew of the particular construction of the plaintiffs' house; and, in my opinion, the question ought to have been left to the jury to find whether the support required for the plaintiffs' house was more than reasonably required by a house of the apparent dimensions and character of the house of the plaintiffs, if used for the purpose for which the house was used. If this question had been answered in the affirmative, the verdict would have been for the defendants, but if answered in the negative, for the plaintiffs. Lush, J., entirely withdrew the case from the jury, and, in my opinion, there must be a new trial if the defendants desire it.

I think it unnecessary to enter at length into the question whether, assuming the contractor, Dalton, to be liable to the plaintiffs, the defendants, the commissioners, are answerable for the injury caused by the acts of their contractors. On this point

(1) 7 H. L. C. 349. (2) 13 C. B. (N.S.) 841.

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I agree with the decision in *Bower* v. *Peate* (1), that where a defendant has employed a contractor to do work, which in its nature is dangerous to a neighbouring property, and damage is the result of the work done, the employer is liable, though he has employed a competent contractor and given him directions to take precautions in executing the work.

BRETT, L.J.:—In this case it seems to me very desirable, in order to express exactly my view of the law, to commence by stating what I understand and assume to have been those facts, which were material to the decision which were in evidence at the trial. I collect them from the judgments: it was not in any way, as I apprehended, argued before us, that they had been misunderstood by the judges of the Queen's Bench Division. As collected from the judgments of Lush, J., and the Lord Chief Justice, they were, that there had been before 1849 two dwelling houses adjoining each other, each built to the extremity of the soil belonging to its owner, but each independently built, so that they were without any party-wall. In 1849 the plaintiffs altered the dwelling house then belonging to them into a coach factory, and so altered the structure as to make it, as a building, different from what it had been before, but the same as it was when it fell. It was, as I apprehend, at the trial and on the argument in the Queen's Bench Division taken as a fact, proved or admitted, that they made the alteration without any grant from the owner of the adjoining premises of any right of lateral support, unless his assent is necessarily to be inferred from his taking no steps to resist the acquisition and enjoyment of such support. This is what I gather from the express statement of the Lord Chief Justice; (2) and Lush, J., says (3): "Nothing is shewn except that the adjoining owner was not asked for and did not give his assent to the alteration of the house into a factory." The adjoining owner was never in fact asked for and never in fact gave his assent to the alteration of the house into a factory; the adjoining owner, however, must have known that the building was in and from 1849 used as a coach factory instead of a house, but there was no

(1) 1 Q. B. D. 321. (2) 3 Q. B. D. 101.
(3) 3 Q. B. D. 94.

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evidence that he knew the nature or extent of the structural alterations made in the building. The work complained of was done by one Dalton, a builder, under contract with the commissioners: it was done according to the plans he was instructed to carry out without negligence on his part; the plans did not disclose any danger to the plaintiffs' building; work done according to them might have been reasonably deemed to be sufficient to prevent any damage to it. But by exposure to the air the thick pillar of clay, left by Dalton according to the plans, between his workings and the plaintiffs' building cracked and gave way, and so the plaintiffs' factory was brought down. The pillar of clay left might have supported the plaintiffs' land in its natural state, but did not support the land with the factory on it.

Upon this evidence Lush, J., directed the jury, as matter of law, to find a verdict for the plaintiffs, leaving them to move for judgment. Upon a motion to that effect, Lush, J., gave judgment that the direction was right, and that the plaintiffs were entitled to judgment; the Lord Chief Justice and Mellor, J., gave judgment that the verdict ought to have been directed to be entered for the defendants, and that they were entitled to judgment.

It was contended before us, on appeal, that the judgment ought to be for the plaintiffs, or that there ought to be a new trial.

The learned judges of the Queen's Bench Division seem to have been agreed on many propositions; as that the right to lateral support from the adjacent soil of an adjacent owner necessary for buildings in addition to the support necessary for the soil on which they stand, is not a right of property; that such a right may exist, but if it does, it is a right which exists as the result of an easement; that such an easement can, in consideration of law, only have its origin in grant; that such an easement is not within the Prescription Act (2 & 3 Wm. 4, c. 71); that upon proof of twenty years' enjoyment after knowledge by the adjoining owner of the support given by his soil, and absence of any other evidence, a jury ought to be directed to find for the claimant a right, as if there had been a grant in the nature of an easement.

The points of difference were, that Lush, J., held, that where there has been in fact an enjoyment of lateral support to a building for twenty years without physical obstruction, the jury

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are to be directed, as matter of law, to find for the right, and no evidence is admissible to shew that there never was a grant, or that the defendant had no knowledge of the nature or extent of the support given by his soil or premises, or that he objected otherwise than by physical obstruction. And he deduced this doctrine as a necessary consequence, not of the Prescription Act (2 & 3 Wm. 4, c. 71), but of the Limitation Act (3 & 4 Wm. 4, c. 27). The other learned judges held that enjoyment for twenty years, with other circumstances, may be primâ facie evidence of an original reservation or grant, but that such primâ facie evidence may be met by evidence arising either in the plaintiff's or defendant's case, shewing that no such reservation or grant was ever in fact made; that if the evidence on the latter points be questionable, the whole evidence must be left to the jury; but if such evidence be not questioned or questionable, the jury should be directed to find that there never was any reservation or grant, and therefore that there never was any right. They further held, that as in this case the fact of there never having been any real grant or reservation was not questioned or questionable, the jury ought to have been directed to find for the defendants.

As to the question raised by reason of the employment of Dalton as an independent contractor, all the judges were agreed that the case of *Bower* v. *Peate* (1) was applicable and binding, so that if the plaintiffs were entitled to the support they claimed, they were entitled to judgment both as against the commissioners and Dalton, whether there was or was not negligence on the part of Dalton, or, if there was negligence by Dalton, whether they had or had not the right to support.

On the argument before us it was contended, on behalf of the plaintiffs, that the right to lateral support from the adjacent soil of an adjacent owner necessary for buildings in addition to the support necessary for the support of the soil on which they stand, is a right of property; that such a right, if only an easement, is within the Prescription Act; that if not, and though the right be only an easement, yet a user for twenty years without physical obstruction gives a legal right on which a judge is bound to direct in favour of the plaintiff, and in derogation of which no evidence

(1) 1 Q. B. D. 321.

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is admissible; that at all events a user for twenty years without any evidence to explain the origin of it entitles the person in possession to a direction to the jury to find a right as if by grant, and that in this case there was no evidence to explain the origin, and that the plaintiffs were therefore entitled to the direction which was given at the trial; and that there was evidence, which at least ought to have been left to the jury, for them to say whether they would find that there had been a grant; and that there was evidence of negligence, which ought to have been left to the jury.

The first question, then, to be determined is, whether the right claimed is a right of property, for if it is, it is unnecessary to inquire further in this case, the plaintiffs being clearly entitled to succeed. If such a right is admitted, it existed ex necessitate from the moment the factory was constructed. It must be, if it exists, a right wholly independent of the consent or knowledge of the defendants, created solely by the will and acts of the plaintiffs. The questions of twenty years' user, of knowledge by the defendants, of negligence, are all immaterial. It is contended that this right is a right of property, first, as the result of reasoning from principle, and, secondly, as being settled by authority.

As to the first, it is said that the right claimed is in strict analogy with rights which have been admitted to be rights of property, as the right of support of land not built upon, the right to the use of the light and air where adjacent soils are both unincumbered. The validity of this argument depends on whether the alleged analogy exists. It exists, if the reasons for which the right has been recognised in those cases are applicable to the claim now under discussion, but not otherwise: Cessante ratione, cessat lex. The reason given in those cases has been, that such rights must be admitted if the owner of land is to enjoy it, if he so pleases, as it must have been always in nature from the beginning. They are attributes of nature given for the common benefit of mankind. "They are," (says Parke, B., in *Embrey* v. *Owen* (1)), "bestowed by Providence for the common benefit of man." And he relies upon the elaborate judgment of Mr. Justice Story in *Tyler* v. *Wilkinson* (2), in which the right is founded on

(1) 6 Ex. 353, at p. 372.

(2) 4 Mason, 397.

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this reason. The support to land in its natural state by adjacent land in its natural state must necessarily have existed from the beginning, so must the run of water, so must the passage of light and air over lands unincumbered by buildings. Unless each owner is entitled, as of natural right, to enjoy unmolested his land with all those attributes given to it by nature, he has not a free and absolute use of it. Such a right "stands on natural justice, and is essential to the protection and enjoyment of property:" *Humphreys* v. *Brogden.* (1) The reason, then, why the right is admitted in all those cases is, that without such a right the owner cannot enjoy his land, if he so pleases, in the condition in which it was given for the enjoyment of man by nature. It is obvious that the reason is not applicable to a claim of support necessary for such a building as any one may according to his fancy erect, requiring more or less support according to the size or form which he has given to the particular structure, but requiring by the hypothesis more support than is necessary for the support of the soil on which it stands. Not only is the reason given for allowing the right to be a right of property in those cases inapplicable to the case now under discussion, but to allow the present claim would be inconsistent with that reason, because the exercise of the claim by the one owner would prevent the enjoyment by the other of his land as nature gave it. As the result of logical reasoning or deduction from admitted principles, therefore, the present claim cannot be maintained.

Then follows the question, whether authorities by which we are bound have decided otherwise. The first on this subject is the passage in Rolle's Abridgment, citing a case of *Wilde* v. *Minsterley.* (2) It is an authority which has been so frequently cited and acted upon, that it is certainly binding. But it consists of two parts, and it seems difficult to say with propriety that it is to be treated as a binding authority as to one, and as wrong as to the other; more especially, as the part which has been distinctly adopted, namely, that with regard to land unbuilt upon, is that which is introduced by the term "semble," whilst that, which it

(1) 12 Q. B. 744.

(2) 2 Roll. Abr. Trespass (I) pl. 1. The passage is translated in a note to *Wyatt* v. *Harrison,* 3 B. & Ad. 871, at p. 873.

is now said should be rejected, is the cited decision of the Court. That decision is clearly that the claim to support for a house is not a right of property. The distinction taken is between the right of support to land in its natural state, and the right to support of buildings upon the land, and the right of the latter in the case of a new house is distinctly denied. But if the right be a right of property, it must exist in the case of a new house just as much as in the case of an old house: as the right of the land itself to support is just as absolute the day after the two ownerships are called into existence, as twenty years or any number of years afterwards. The judgment of Lord Tenterden in *Wyatt* v. *Harrison* (1) is distinct. "Whatever the law might be, if the damage complained of were in respect of an ancient messuage possessed by the plaintiff at the extremity of his own land, which circumstance of antiquity might imply the consent of the adjoining proprietor at a former time to the erection of a building in that situation, it is enough to say in this case that the building is not alleged to be ancient, but may, so far as appears from the declaration, have been recently erected; and if so, then, according to the authorities, the plaintiff is not entitled to recover. It may be true that if my land adjoins that of another, and I have not by building increased the weight upon my soil, and my neighbour digs in his land so as to occasion mine to fall in, he may be liable to an action. But if I have laid an additional weight on my land, it does not follow that he is to be deprived of the right of digging his own ground, because mine will then become incapable of supporting the artificial weight which I have laid upon it. And this is consistent with 2 Rolle's Abridgment." The whole of this passage is necessarily wrongly conceived, and the decision of the case is wrong, if the right now claimed is a right of property: because it must be always remembered that, if the right is a right of property, the length of time since the house in respect of which the claim is made was built, is immaterial. The judgment of Alderson, B., in *Partridge* v. *Scott* (2) is also against the claim as a right of property. "Rights of this sort, if they can be established at all, must, we think, have their origin in grant. If a man builds his house at the extremity of his land, he does not

(1) 3 B. & Ad. 871, at p. 875. (2) 3 M. & W. 221.

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thereby acquire any right or easement for support, or otherwise, over the land of his neighbour. He has no right to load his own soil so as to make it require the support of that of his neighbour, unless he has some grant to that effect. *Wyatt* v. *Harrison* (1) is precisely in point as to this part of the case, and we entirely agree with the opinion there pronounced." This discussion is without meaning, if the claim could be supported as of a right of property. The statement of the law as to lateral support in the judgment in *Humphries* v. *Brogden* (2) is the same. The principle is deduced by Lord Campbell from the passage in Rolle, and stated to be settled by *Wyatt* v. *Harrison*. (1) After stating that the right of land in its natural state to support from adjacent land is a right of property, he goes on to say: "This right to lateral support from adjoining soil is not, like the support of one building upon another, supposed to be gained by grant, but is a right of property passing with the soil." It must in fairness be observed that the contrast he draws is in terms between the support given to a building by a building; but the reasoning is surely equally applicable to the support given to a building by land. *Gayford* v. *Nicholls* (3) seems directly against the claim. There it was decided that the plaintiff had no right to support for his building from the defendants' adjacent soil. "This not a case," says Parke, B., "in which the plaintiff has the right of the support of the defendants' soil, either by virtue of a twenty years' occupation, or by reason of a presumed grant, or by a presumed reservation, where both houses were originally in the possession of the same owner; for unless a right of support by some such means can be established, the owner of the soil has no right of action against his neighbour, who causes the damage by the proper exercise of his own right." Here again in one branch of the sentence he no doubt speaks of a right by virtue of a twenty years' occupation; but if he had intended that such an occupation of itself gave an indefeasible right, he would not have introduced the next phrase as to a right by a presumed grant, which would be wholly unnecessary; for in order to found that presumption there must be a twenty years' occupation. By the former phrase, therefore, he must have alluded,

(1) 3 B. & Ad. 871. (2) 12 Q. B. 739.
(3) 9 Ex. 702, at p. 708.

although only in general terms, to the user for twenty years, from which unexplained a prescriptive user may be inferred. He speaks also of two houses, but that is in the phrase relative to a right by reservation. It was suggested, however, that the case of *Bonomi* v. *Backhouse* (1) is to the contrary, and is binding. But the first observation to be made is, that there is no reference in the facts stated by the arbitrator to any distinction between the support necessary for the land, if it had been unbuilt on, and that necessary for the buildings. It is consistent with the statements and findings, that the workings complained of would have let down the plaintiff's land, if there had been no buildings on it. This is easily accounted for, if the workings would in fact have let down the land itself of the plaintiff, because the arguments appear to have been confined to the question of what is the cause of action in such cases, and what is the time at which a cause of action accrues. The want of reference, either in the statement of facts by the arbitrator or in the arguments, to the distinction between the support to buildings and that to mere land is natural and right, if the workings would have let down the land, though there had been no buildings on it, but is inexplicable otherwise. The judgments then are to be applied to excavations which would let down the plaintiffs' land, though not built upon. In that view it was right to say that "in such cases as the present the right claimed by the plaintiff was not a right founded upon the presumption of a grant or easement, but the common right of the owner of land not to be injured in his property, &c." If the excavations in that case would not have let down the land as mere land of the plaintiff, the judgment of Willes, J., in the Exchequer Chamber, the reasoning of which is adopted as correct in the House of Lords, could not have been given without inquiring as to the origin of the admitted right in that case of the plaintiff to support. "The right to support of land and the right to support of buildings stand," he says, "upon different footings *as to the mode of acquiring them*, the former being primâ facie a right of property analogous to the flow of a natural river or of air, &c.; whilst the latter must be founded upon prescription, or grant express or implied. . . . But the character," he says, "of the

(1) E. B. & E. 622; in Ex. Ch. E. B. & E. 646; 9 H. L. C. 503.

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rights, when acquired, is in each case the same. The question in this case depends upon what is the character of the right." The question, therefore, was not what is the origin of the right, that is to say, the mode of acquiring it, but what is the character of the right when acquired. There was no question as to how the right in that case had been acquired; it was admitted to exist; but the statement in the judgments of the law as to the origin of such a right is directly contrary to the argument urged on behalf of the plaintiffs in the present case. The right to support of buildings *must*, it is said, be founded on prescription, or grant express or implied; if so, it cannot be, and it is stated not to be, a right of property. I am therefore of opinion that, both on reason and authority, the right to support from the adjacent soil of an adjacent owner, necessary for buildings in addition to the support necessary for the soil on which they stand, is not a right of property.

The next question is, whether there can be such a right given by means of an express grant; and if yes, what is the character of such a grant? In order to answer this question, the character of the right, if it can exist, should be considered. It has been pointed out in the case of the right to the advent of light to windows or other openings in a building, that no grant is required of leave to a man to build a house with windows or other openings at the extremity of his own land; he has the right without a grant. Such a grant would be futile and inoperative; but the erection of the building gives its owner no right to prevent his neighbour from building on his land so as to obstruct the light which would otherwise come across his land to the windows or openings of the first builder. The owner of the adjacent land may, however, by grant covenant that no building on his land shall interrupt the free use of light from across his land to the building erected or to be erected by the grantee on his land. This is the judgment of Littledale, J., in *Moore* v. *Rawson* (1), and such a grant imposes a servitude on the adjacent land of the grantor: see per Cresswell, J., in *Smith* v. *Kenrick* (2); which servitude, as pointed out in a note to p. 320 of Gale on Easements, must be a servitude like that of the Roman "Ne facias," affecting the grantor's land by burdening

(1) 3 B. & C. 332. (2) 7 C. B. 565, 566.

it with a negative easement, "Ne facias." So, in the present case, that is to say, in the claim of right to support now under discussion, a grant to the claimant of permission to build his house at the extremity of his own land, and so as to require support from the defendants' soil, would be futile. The claimant of such a right has an absolute inherent right to build any house requiring any support at the extremity of his own soil; but there seems to be no valid reason why the adjacent owner should not by grant impose upon his own adjacent soil the servitude, that it shall not be so dealt with as to leave the grantee's building without support from it, or an equivalent support provided by the owner of such servient soil. The analogy is perfect between this grant and that admitted to be legal and binding in the case of light. Suppose such a grant made for a valuable consideration: there is no principle of law which can forbid its being binding any more than in the case of a similar grant with regard to light. Such an easement, therefore, can be created by express grant.

If there could be an express grant, imposing by its legal effect such a servitude on the grantor's land, can such a servitude be prescribed for at common law? Subject to the well recognised conditions of the evidence upon which such a prescription may be founded, there seems to be no legal reason why it should not. If evidence were given of the existence, as long as living memory could reach, of a building situated at the extremity of the owner's soil, of such a size or form of construction that it requires support from the soil of the adjacent owner, and if no evidence could be or were given by reason of the style or materials of the building or otherwise, that the building was or must have been erected within the time of legal memory, there seems to be, and in my opinion there is, no legal reason why the owner should not, on controversy, be entitled to prescribe for a right to the necessary lateral support; but in point of fact there can hardly arise any such case; the origin of the building at a time later than the time of legal memory could, by scientific or other evidence, invariably be proved. The difficulty of maintaining the right, as by prescription at common law, is a difficulty of fact and not of law.

Is the case within the Prescription Act? I agree with the unanimous decision of the judges of the Queen's Bench Division

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that it is not. One reason alone is decisive. Such a negative easement as this is clearly not within the statute.

The next question is, can such an easement be supported by the application of what has been called the doctrine of a lost grant? Such a right might be created by an express grant; it is a right of easement; it is an easement strictly analogous to those in which it is admitted that, upon certain evidence, a jury should be directed to find a right in the plaintiff as arising upon a lost grant, or in which, upon other evidence, it should be left to a jury to say whether they would infer such a lost grant. Unless, therefore, it is justifiable in the courts of the present day to say that they will no longer apply this doctrine even to cases to which it has before been applied, or that they will not apply this principle to a case strictly analogous to the cases to which it has hitherto been applied, it must be applied to such a case as this. But I am of opinion that no Court has the power legally to set aside a principle of law which has been established as law by the highest tribunal or tribunals, to whose decision this Court must bow, or to refuse to apply it to any case brought within the proposition enunciated in and by the principle. Moreover, it has been repeatedly recognised by many judges that this principle is applicable to this very right. The statement in Selwyn's Nisi Prius of the direction of Lord Ellenborough in *Stansell* v. *Jollard* (1), although it may not go further, does at least go the length of affirming that upon proof of a twenty years' user, and no evidence which proves the contrary, a grant may be inferred, and the right thereupon found and established by the jury. The rule of Parke, B., in *Hyde* v. *Thornborough* (2) also affirms this proposition: "If there were twenty years' enjoyment by the plaintiff of the support of the house from the defendant's land, and it was known that the defendant's land supported the plaintiff's house, that is sufficient to give him a right of support." That is, at least, to say, that upon such evidence a jury may find that he has such a right. But the origin of such a right must be a grant express or implied. This is, therefore, an authority that the jury may upon such evidence infer a grant. The passage before quoted from the judgment of Parke, B., in *Gayford* v. *Nicholls* (3), does of necessity also import, at least,

(1) 1 Selw. N. P. 457 (11th ed.). (2) 2 C. & K. 250. (3) 9 Ex. 708.

this same proposition. The phrase "either by virtue of a twenty years' possession," imports, at least, that evidence of twenty years' possession is material evidence; but, if material, it must at least be evidence from which a grant may be inferred; and in the next phrase he says in plain terms, "or by reason of a presumed grant." So Bramwell, B., in *Rowbotham* v. *Wilson* (1): "But after a house has stood in such a position twenty years, it acquires a right to support from the adjoining land." This must at least mean that it is evidence from which, if uncontradicted or unexplained, a grant may be inferred. In the judgment of Lord Campbell, in *Humphreys* v. *Brogden* (2), he says: "Where a house has been supported more than twenty years by land belonging to another proprietor with his knowledge, and he digs near the foundation of the house, whereby it falls, he is liable to an action at the suit of the owner of the house." He cites as authorities *Stansell* v. *Jollard* (3) and *Hyde* v. *Thornborough* (4), and the judgment of Willes, J., in *Bonomi* v. *Backhouse* (5), where speaking of the right of support to buildings as distinguished from the right of support to land, he says: "It must be founded upon prescription or grant, express or implied." It is impossible that these passages could have been written unless those who wrote them were of opinion that a right to support of a building from the adjacent soil of an adjacent owner might be inferred from evidence of twenty years' user. I am thus brought to acquiesce in all the propositions in which the learned judges of the Queen's Bench Division were agreed, and to have only further to give my opinion upon the proposition on which they differed.

Unless we are controlled by authority, we ought not, as it seems to me, to take what I will respectfully venture to call the bold step taken by Lush, J. He deprecates that which, he affirms, was an assumption of legislative power by the judges, who introduced the fiction of a lost grant; but, with deference, I think he exercises the power of legislation, and does not confine himself to the duty of declaration, when he holds that a twenty years' user without physical obstruction shall, of itself, as matter

(1) 8 E. & B. 140.
(2) 12 Q. B. 749.
(3) 1 Selw. N. P. 457 (11th ed.).
(4) 2 C. & K. 250.
(5) E. B. & E. 655.

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of law, confer a right, not because such facts bring the case within the Prescription Act, or the Limitation Act, but by judicial authority, because the Statute of Limitations has fixed twenty years as the limit, after which under certain conditions an action cannot be maintained for the recovery of real property. I incline to agree that the judges of former times did encroach upon the legislative function in what they held with regard to the doctrine of a lost grant, and to the effect they gave, in support of that doctrine and of the doctrine of prescription, to a user of twenty years. Yet so far as their ruling has been affirmed by Courts, to whose decisions we owe obedience, we are, in my opinion, bound to accept and apply their ruling. But I do not think that any judges now should, in order to overcome a different apparent hardship or difficulty, follow their example. This then being the doctrine which is to be applied, a question has been raised whether, in applying it, it is necessary to find formally that there has been a grant which is lost, or whether it is sufficient without going on to find the inference that there has been a grant and that it is lost, to find the fact of an uninterrupted user for twenty years after knowledge of the burden imposed on the adjacent land. That must depend on whether the inference is to be treated as a necessary legal consequence or as an inference of a fact. If it is an inference merely of law, I can see no distinction, not even the slightest, between the doctrine or application of the doctrine of a lost grant, and the doctrine of prescription under the Prescription Act. If we were to hold that it is a mere inference of law, it seems to me that we should be doing in an analogous form precisely what was done by the judgment of Lush, J., which I think cannot be supported. Such a decision is legislation and not declaration. The forms of expression used by Lord Ellenborough, by Parke, B., and Bramwell, B., in the passages I have cited, are relied upon as shewing, it is said, that in their opinion a twenty years' user, uninterrupted in fact, gives an absolute right, and therefore a right which cannot be contradicted, and therefore a right on the part of the plaintiff who has proved such user to a judgment thereupon that he has established his right. But those expressions are consistent with the view that those learned judges were speaking of the effect of evidence of user for

twenty years *without any other evidence*, and as laying down that in such case in a trial before a judge and jury, the judge would be bound to direct the jury to find the existence of a lost grant. They seem to me, when read with their context, to be only consistent with that interpretation of them. I do not believe that any one of those learned judges meant to say that in the case of a trial by judge and jury the plaintiff could succeed without a finding by the jury under direction, or upon consideration, of the existence of a lost grant: none of them meant to say that a special verdict would have been good which did not in terms find the existence of a grant. No case, I am sure, can be found in which on a trial with a jury the judge has not either directed the jury to find, or left to them to find, the fact as a fact whether there has been a grant. No judge could have called this doctrine a revolting doctrine, unless he had been of opinion that the jury must be asked to find the fact as an existing fact. If it were only an inference of law, there is nothing which can be called revolting in it. In order therefore to support such a claim, the existence of a lost grant must be found as a fact. If the case is tried before a judge without a jury, he must find such fact, though he may not do so in terms; if it is tried before a judge and jury, inasmuch as the judge cannot in such case determine any fact, it is the jury which must find the fact. This raises another question, namely, whether the judge may under certain circumstances direct the jury as matter of law to find the fact; and if he may, what are the circumstances under which he may or must do so. It is admitted by every one, I think, that he is bound to do so, where there is evidence of twenty years' uninterrupted user after knowledge of the facts and no other evidence. Now arises another question, which is, what other evidence is admissible or may be acted on? Is it only evidence of acts of interruption? or, although no act of interruption has been done, may evidence be given tending to shew that no grant was in fact ever made? If the parties are alive, may they be called to prove conclusively that there never was a grant? If the question, whether there ever was a grant, is one of fact to be found by the jury, I know of no principle of law which can exclude evidence tending to shew that there never in fact was such a grant. The legislature might forbid such evidence to be given, but there the legislature would in reality enact with

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regard to a right to lateral support a Prescription Act similar to that which they have enacted with regard to lights and rights of way. To introduce into the common law proposition as to a lost grant the limitation of interruption only by acts, is to introduce a limitation which it required an Act of Parliament to introduce in the case of lights and ways. The limitation as to them has been held to be an inference from the statute. The legislature has not done so. The doctrine of inferring a lost grant was brought forward and applied, because there is no prescription. The distinction between the two doctrines and the legal mode of applying the latter seem to me to be clearly laid down by Lord Mansfield in the *Mayor of Hull* v. *Horner* (1). In that case the question was left to the jury, "whether they would not consider the usage from the year 1441 to the time of action brought" (i.e., in 1774) "sufficient ground to presume a grant of the duties between the 5th Richard 2 (anno 1382) and the year, 1441." There had therefore obviously been an uninterrupted user for more than 300 years, and yet the question was left to the jury. "Now with regard to admitting evidence to satisfy a jury that a charter did exist within time of memory which is not produced by record, my opinion is this, that all evidence is according to the subject-matter to which it is applied. There is a great difference between *length of time which operates as a bar* to a claim, and *that which is only used by way of evidence*. A jury is concluded by length of time that operates as a bar; as where the Statute of Limitations is pleaded in bar to a debt, though the jury is satisfied that the debt is due and unpaid, it is still a bar. So in the case of prescription, if it be time out of mind, a jury is bound to conclude the right from that prescription, if there could be a legal commencement of the right. But any written evidence shewing that there was a time when the prescription did not exist, is an answer to a claim founded on prescription. But *length of time used merely by way of evidence may be left to the consideration of the jury to be credited or not, and to draw their inference one way or the other according to circumstances.*" And afterwards: "In questions of this kind possession goes a great way; but there is no positive rule which says that 150 years' possession, or any length of time within memory is a sufficient

(1) Cowp. 102.

ground to presume a charter." He must, by the context, mean "to presume as *a presumption of law*." Again: "Under circumstances it may be left to the consideration of a jury or of a court of equity if the case comes properly before them, whether there is not a sufficient ground to presume a charter." The cases of *Campbell* v. *Wilson* (1), *Darwin* v. *Upton* (2), and *Cross* v. *Lewis* (3), are precisely, as I understand them, to the same effect, namely, that although the user is for twenty years without interruption, the inference must be left to the jury.

I am, therefore, of opinion, in conclusion, that the right to lateral support from the adjacent soil of an adjacent owner necessary for buildings in addition to the support necessary for the soil on which they stand, is not a right of property; but that such a right may be established; that where it exists, it consists of a negative easement, by which the land of the adjacent owner is burdened with the servitude that it cannot be so used as to deprive the building of the adjacent owner of the support acquired by virtue of the easement, unless an equivalent support is supplied; that such an easement might be given at once by express grant of the owner of the servient property, and the servitude so imposed would pass with the land; that such a servitude might, as matter of law, be proved as by prescription at common law; but could hardly be so proved, as matter of fact, in accordance with the legal conditions of evidence as to such a prescription; that such an easement is not within the Prescription Act (2 & 3 Wm. 4, c. 71); that such an easement, if it exist in a particular case, must, in contemplation of law, have originated in a grant; that the claim to it may be supported by evidence complying with the legal doctrine of an alleged lost grant; that if in any particular case evidence be given of the existence for twenty years, without interruption, of a building which for that period has required and had support from the soil of the adjacent owner, and the building is of such a nature or in such a position that it must have been apparent to any observant person that it required such support, or if the adjacent owner in fact had notice that it required such support, and if no evidence be given tending to shew that there could not have originally been

(1) 3 East. 294. (2) 2 Wm.'s Notes to Saund. 506.
(3) 2 B. & C. 686.

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or that there was not and never had been a grant, the plaintiff would be entitled to a direction, as matter of law, to the jury to find for the plaintiff a right to support, as if he had a grant which is lost. If the existence of the building for twenty years be proved, but there is contradictory or doubtful evidence as to the question whether it must have been apparent that it required support, or whether the adjacent owner had notice that it required support, or of circumstances tending to shew that there could not have been and was not and never had been any grant or the like, then the evidence must be left to the jury for them to say, whether they will or will not find for the plaintiff a right to support in respect of a grant which is lost. If there be no evidence of the existence of the building for twenty years, or if there be undisputed or necessarily conclusive evidence, or if it be admitted, that there was no grant and never had been any grant, then the defendant is entitled to a direction, as matter of law, in his favour.

Upon the present occasion it seems to me that the case was at the trial treated by all the parties upon the footing that there was conclusive evidence, or an admission, that there never had been a grant. I am of opinion that there was no evidence of negligence in excavating. I am, therefore, of opinion that all the defendants were entitled to a decision in their favour, that the plaintiffs had no right to the support they claimed, and that they had given no evidence of negligence, and that therefore the plaintiffs had made no case against any of them. The point raised with regard to *Bower* v. *Peate* (1) does not therefore become material. I, therefore, give no opinion upon it. The judgment should, in my opinion, be affirmed.

Judgment reversed. (2)

Solicitors for plaintiffs: *Shum, Crossman, & Crossman, for Stanton & Atkinson, Newcastle-upon-Tyne.*

Solicitors for commissioners: *The Solicitor for the Treasury, Hare & Fell, Agents.*

Solicitors for defendant Dalton: *Prior, Bigg, Church, & Adams, for T. Dalton, Leeds.*

(1) 1 Q. B. D. 321.

(2) *The order of the Court of Appeal directed that the defendants should elect within fourteen days whether they would take a new trial, and if they did not so elect, that judgment should be entered for the plaintiffs for the amount of damages assessed by the special referee.*

BELL *v.* THE NORTH STAFFORDSHIRE RAILWAY COMPANY.

1879
Jan. 15.

Practice—Appeal from Master at Chambers, Time for—Order LIV., rule 4.

In order that an appeal from a master to a judge at chambers may be in time, according to Order LIV., rule 4, it is not sufficient that the appeal summons should be taken out within four days from the master's decision, but it must be made returnable within the four days.

APPLICATION by way of appeal from the decision of Hawkins, J., at chambers, dismissing an appeal from the decision of a master.

The application to the master, which was an application by the defendant to stay proceedings, on the ground that the writ had expired, was heard on the 23rd of December. The master refused the application. The defendant took out an appeal summons on the 24th of December, which was made returnable on the 31st of December. When the case came on for hearing on the latter day before Hawkins, J., the plaintiff's counsel objected that the appeal was out of time, inasmuch as under Order LIV., rule 4, the summons should have been made returnable within four days after the decision complained of. It appeared that a judge sat at chambers on the 27th of December. The learned judge dismissed the application on the ground that it was out of time.

Graham moved, by way of appeal, from the decision of the learned judge. He contended that it was sufficient under Order LIV., rule 4, if the summons were taken out within the four days after the decision appealed against.

Gould, shewed cause.

KELLY, C.B. It seems to us clear that the meaning of the rule is that the appeal summons must be made returnable within the four days, so that the hearing in the absence of any adjournment may take place within that time. The rule must be refused.

POLLOCK, B. I agree. I think the construction of the 4th rule of Order LIV., must be similar to that of the 6th rule. The appeal from the master to the judge is to be within four days, that from the judge to the Court within eight days. In

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both cases the actual hearing of the appeal is to be within the time prescribed in the absence of an adjournment.

Rule refused. (1)

Solicitors for plaintiff: *Geare & Son.*
Solicitors for defendants: *Burchells.*

Jan. 13.

GAY *v.* LABOUCHERE.

Practice—Interrogatories, Striking out—Irrelevance—Order XXXI., rule 5—*Rules of November*, 1878.

Objections to particular interrogatories on the ground of irrelevance, or that they seek discovery of the other party's evidence, must be taken in the affidavit in answer, and do not afford ground for setting aside the interrogatories.

APPEAL from the decision of Field, J., at chambers, dismissing an application to strike out interrogatories administered by the plaintiff to the defendant.

The action was one of libel, and the defendant had pleaded, denying the publication, and that the libel was true in substance. The plaintiff had administered interrogatories to the defendant, among which were the interrogatories objected to on the grounds mentioned in the argument. (2)

C. Russell, Q.C., and *E. Clarke*, on behalf of the defendant, moved to vary the order of Field, J. The objection to the first interrogatory is that it inquires what facts the defendant will rely on in support of the plea of justification. That is matter for particulars, not for interrogatories.

[COCKBURN, C.J. Why should not the plaintiff have this information by means of interrogatories as well as by particulars?]

He is not entitled to this information on oath. Further facts might come to the defendant's knowledge, and in that case

(1) This case was heard before the Exchequer Division sitting to take motions from all the divisions.

(2) It is not thought necessary to set out the interrogatories, inasmuch as they were lengthy, and the general nature of the objections raised to them sufficiently appears from the arguments to render the point decided intelligible.

particulars might be amended, but there would be a difficulty in the case of interrogatories.

[COCKBURN, C.J. In the equity courts the defendant had to answer on oath as to the facts of his case. I do not see why the defendant should not give the information on oath. Probably an application may be made to supplement the answers to the interrogatories if any subsequent facts are discovered.]

The other interrogatories objected to are objectionable, some of them as being irrelevant, and some of them as seeking to inquire not merely into the facts of the defendant's case, but into his evidence and the names of his witnesses. It will be suggested that the objections should be taken in the affidavit in answer, but the defendant could not safely take that course. Parts of many of the interrogatories may be unobjectionable, and if the defendant answers such parts it would seem, according to the practice in the Equity Division, he may be held to have waived his objections, and to be bound to answer in full. The defendant therefore seeks to have the interrogatories reformed before answering.

[They cited *Ede* v. *Jacobs* (1) and *Saunders* v. *Jones*. (2)]

Lumley Smith shewed cause, and contended that the objections to the interrogatories taken on the defendant's behalf were such as under the Rules of November, 1878, Order XXXI., rule 5, should have been taken in the affidavit in answer, and did not afford any ground for striking out the interrogatories. (3)

C. Russell, Q.C., in reply. The interrogatories are exhibited unreasonably and vexatiously, if they are of an improper character and irrelevant.

[POLLOCK, B. The words "exhibited unreasonably or vexatiously" would not appear to apply to objections of the kind here taken, but to have reference to objections with regard to the time

(1) 3 Ex. D. 335.

(2) 7 Ch. D. 435.

(3) The 5th rule of Order XXXI. is as follows: "Any objection to answering any one or more of several interrogatories on the ground that it or they is or are scandalous or irrelevant, or not bonâ fide for the purpose of the action, or that the matters inquired into are not sufficiently material at that stage of the action, or on any other ground, may be taken in the affidavit in answer.

"An application to set aside the interrogatories on the ground that they have been exhibited unreasonably or vexatiously, or to strike out any interrogatory or interrogatories on the ground that it or they is or are scandalous, may be made at chambers within four days after service of the interrogatories."

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or stage in the cause at which the interrogatories are exhibited, and objections of that nature.]

COCKBURN, C.J. It seems to me that the objections taken to these interrogatories do not bring the case within either of the classes of objections referred to in the second branch of the new rule. This is not a case where the interrogatories as a whole are unreasonably or vexatiously exhibited, nor is it a case in which any particular interrogatory or interrogatories is or are scandalous. Therefore the case falls within the first branch of the rule, and the objections must be taken in the affidavit in answer.

POLLOCK, B., concurred.

Rule refused.

Solicitors for plaintiff: *G. S. & H. Brandon.*
Solicitors for defendant: *Lewis & Lewis.*

[IN THE COURT OF APPEAL.]

1878
Dec. 6.

JAMESON & CO. *v.* THE BRICK AND STONE COMPANY, LIMITED.

Bankrupt, Undischarged, when he can sue—Bankruptcy Act, 1869 (32 & 33 *Vict.* c. 71), *s.* 17.

An undischarged bankrupt may maintain an action, in respect of a debt due to him for work and labour done after his bankruptcy, if the trustee does not interfere.

Herbert v. *Sayer* (5 Q. B. 965) followed.

ACTION for preparing plans of certain buildings, and also executing surveys for the defendants.

At the trial at the Northumberland Summer Assizes, 1878, before Baggallay, L.J., the following facts were proved:—The plaintiff Edward Jameson carried on the business of an architect and surveyor under the style of Jameson & Co., and in February, 1877, made plans for the erection and alteration of certain buildings, and also certain surveys of land and valuations of timber and other property for the defendants, for which he claimed 498*l.* It appeared that on the 6th of May, 1873, Edward Jameson was adjudged a bankrupt, and at the time the writ in the present action was issued, the 16th of January, 1878, he was an undis-

charged bankrupt. A trustee under the bankruptcy had been duly appointed who had not interfered.

It was contended on behalf of the defendants that if there was any right of action against them, the plaintiff being an undischarged bankrupt, it vested in the trustee.

The learned Lord Justice held that the trustee not having interfered the plaintiff was entitled to maintain the action, and directed judgment to be entered for him for 498*l.*, subject to a reference to one Lamb to ascertain the fair value of the work done. The referee directed that the judgment entered for the plaintiff should stand, but the damages be reduced to 122*l.*

Against this judgment the defendants appealed.

Digby Seymour, Q.C., and *Gainsford Bruce*, for the defendants. Under the former bankrupt law, no doubt, an uncertificated bankrupt could sue in respect of a cause of action which accrued after his bankruptcy unless his assignees interfered; but under s. 17 of the Bankruptcy Act, 1869: "Immediately upon the order of adjudication being made, the property of the bankrupt shall vest in the registrar, and on the appointment of a trustee the property shall forthwith pass to and vest in the trustee." The property of the bankrupt having become vested in the trustee under the order of adjudication, the bankrupt cannot sue. In *Motion* v. *Moojen* (1) an uncertificated bankrupt was held incapable of suing in Chancery, although the bill alleged fraud. *Herbert* v. *Sayer* (2) was decided on 6 Geo. 4, c. 16, s. 63, and has no application.

Cave, Q.C., and *John Edge*, for the plaintiff. The plaintiff, although an undischarged bankrupt, is entitled to maintain this action, because he can, like any other agent, contract on behalf of his principal, the trustee; and if the trustee does not interfere he can sue in respect of the contract. In *Morgan* v. *Knight* (3) Erle, C.J., says: "It is also clear that an uncertificated bankrupt may acquire property. This appears from the law which transfers his after-acquired property to his assignees. This law assumes he may acquire property, otherwise there could be none to be trans-

(1) Law Rep. 14 Eq. 202. (2) 5 Q. B. 965, 978.
(3) 33 L. J. (C.P.) 168.

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JAMESON v. BRICK AND STONE COMPANY, LIMITED.

ferred; and the result of the cases is, not only that he may acquire property, but that he may hold it against all the world except his assignees; and may create rights to hold it against them, if they expressly or impliedly consent to such property being in his order and disposition at the time of a subsequent bankruptcy." *Herbert* v. *Sayer* (1) is directly in favour of the plaintiff. There is no distinction between the present and late statutes relating to bankrupts.

Digby Seymour, Q.C., in reply.

BRAMWELL, L.J. This case is concluded by authority. *Herbert* v. *Sayer* (1) is expressly in point. If the trustee does not interfere the bankrupt can sue. The law which existed at the time *Herbert* v. *Sayer* (1) was decided exists now. The appeal must be dismissed.

BRETT and COTTON, L.JJ., concurred.

Judgment affirmed.

Solicitors for plaintiffs: *Williamson, Hill, & Co., for Joseph Philipson, Newcastle-on-Tyne.*

Solicitors for defendants: *Cookson, Wainwright, & Pennington, for Clayton & Gibson, Newcastle-on-Tyne.*

1879

Jan. 11.

LA GRANGE *v.* McANDREW.

Practice—Dismissing Action for Want of Prosecution—Security for Costs—Order XXIX., rule 1.

The plaintiff was ordered to give security for costs, the action being stayed in the mean time; but he failed to do so.

The defendant applied to dismiss the action for want of prosecution, under Order XXIX., rule 1:—

Held, that the judge had a discretion to make an order dismissing the action, though the defendant had not abandoned the order for security for costs.

APPEAL against an order of Field, J., at chambers.

The plaintiff was a foreigner resident abroad, and an order had been made staying the action until he should give security for costs.

The time for delivery of statement of claim had expired and

(1) 5 Q. B. 965.

no security for costs had been given. The defendant thereupon applied at chambers to dismiss the action for want of prosecution, and Field, J., made an order dismissing the action accordingly.

J. D. Fitzgerald moved, on behalf of the plaintiff, to rescind the order of Field, J. It was the well established practice that the defendant could not be allowed to sign judgment of non pros. as long as the order for security for costs remained in force. If he wished to force the plaintiff on or sign judgment against him, he must first abandon the order for security for costs.

Russell, Q.C., shewed cause. It is not denied that that was the practice before the Judicature Act, in the Common Law Courts, but the 11th sub-section of the 25th section of the Judicature Act, 1873, enacts, that when the rules of law and equity conflict, those of equity are to prevail, and in equity a Vice-Chancellor always had a discretion in such a case as this to dismiss the bill if the plaintiff could not proceed in a reasonable time.

[COCKBURN, C.J. The provisions of the section would appear from the context to relate to matters of substantive law, not of mere practice.]

The defendant ought not to be subjected to the alternative of having the action hanging over him indefinitely, or of giving up his security for costs.

COCKBURN, C.J. The equity practice seems to my Brother Hawkins and myself to be founded in justice and reason, and though I doubt as to the applicability of the section referred to, I am disposed to think that the practice of the various divisions should be assimilated as much as possible.

The plaintiff is not concluded by our decision, and has an opportunity of appealing to the Court of Appeal; but as far as we are concerned, we think the rule of equity is far preferable, and that the order of Field, J., should be upheld.

HAWKINS, J., concurred.

Rule refused.

Solicitor for plaintiff: *A. G. Ditton.*
Solicitor for defendant: *L. J. B. Rawlins.*

1879
Jan. 16.

Ex parte MARTIN.

County Court—Jurisdiction of County Court to grant Injunction against Nuisance, and to commit to Prison for Disobedience—Judicature Act, 1873, *s.* 25, *sub-s.* 8, *s.* 89—*Order XLII., rule* 5.

Under the Judicature Act, 1873, s. 89, a county court has, in actions within its jurisdiction, power to grant an injunction against a nuisance, and to commit to prison for disobedience thereof.

An action of *Martin* v. *Bannister* was brought in the county court of Warwickshire, held at Coventry, in which the plaintiff claimed damages for a nuisance caused by stenches issuing from a manure manufactory of the defendants, and also claimed an injunction under s. 89 of the Judicature Act, 1873, against the continuance of the nuisance. Judgment was in May, 1876, given for the plaintiff for 5*l.* for damages with costs, and the injunction was granted. An application having been made by the plaintiff to the county court in 1878, to commit the defendants to prison for having disobeyed the injunction, the judge, without going into the merits, refused to entertain the application, on the ground that he had no jurisdiction to commit to prison for disobedience to an injunction.

A rule having been obtained calling on Sir R. Harington, the county court judge, and the defendants, to shew cause why the judge should not hear and adjudicate upon the application,

Dugdale (with him, *Knott*), for the defendants in the action, shewed cause, and referred to 9 & 10 Vict. c. 95, s. 58; 13 & 14 Vict. c. 61, s. 1; 28 & 29 Vict. c. 99, ss. 1, 2; *Reg.* v. *Lefroy*. (1)

Bigham, for the plaintiff, supported the rule, and referred to County Court Rules, 1875, Order XIX., rules 28–30, Judicature Act, 1873, s. 25, sub-s. 8, s. 89, and Order XLII., rule 5 (2); 9 & 10 Vict. c. 95, s. 78.

(1) Law Rep. 8 Q. B. 134.

(2) Judicature Act, 1873, s. 25, sub-s. 8. "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just. . . ."

Section 89. "Every inferior Court which now has or which may after the

KELLY, C.B. In my view this case admits of little doubt. There are two questions involved: first, has a county court judge power to grant an injunction in the case of a nuisance; and secondly, has he the power to enforce it by attachment? I am of opinion that he has the power to grant an injunction, and that he has the same power to enforce it as the High Court has.

This was an action in the county court for damages for a nuisance, in which the plaintiff had a verdict and judgment for 5*l.* for damages, and the injunction which had been claimed was granted restraining the defendants from continuing the nuisance. Now, as to the first question, the Judicature Act, 1873, in s. 25, sub-s. 8, gives power to the High Court of Justice to grant a mandamus or an injunction by an interlocutory order in all cases in which it shall appear to the Court to be just or convenient that such order should be made. That section does not refer to county courts, but it is material to the present question by reason of its bearing upon s. 89 of the same Act, which is the section applicable to this case. [His Lordship read s. 89.] It is impossible to read this section without coming to the conclusion that it was intended to give the power to grant such an injunction. In the present case there was a cause of action for a nuisance, and judgment for the plaintiff thereon, and as incidental to that it is essential that the Court should have power to grant an injunction. If this action had been in the High Court an injunction could have been granted, and if so, what reason is there why the county court should not have the like power under s. 89, which gives to every inferior Court the same power to grant such remedy, "or combination of remedies,"

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passing of this Act, have jurisdiction in equity, or at law and in equity, and in Admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant and shall grant in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counter-claim equitable or legal (subject to the provision next hereinafter contained) in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice."

Order XLII., rule 5. "A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything may be enforced by writ of attachment or by committal."

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in as full and ample a manner as might and ought to be done by the High Court? I can see no reason why it should not.

Then comes the second question, whether the Court has power to enforce the injunction by commitment to prison. If we looked only at those statutes which conferred upon county courts express powers of commitment in particular instances, it might be said that the case ought to be governed by the principle expressio unius exclusio alterius, but it does not rest on those enactments alone. The powers of every inferior Court have been enlarged by s. 89, and the question is whether, according to the natural interpretation of its language, that section does not confer such a power. I think it does. In what other way can a Court enforce its own order? If a Court has power to prohibit a wrong it ought also to have power to enforce its prohibition; and it is difficult to conceive that the legislature intended to give power to grant the injunction, and yet did not intend to give the power to enforce it. It is unreasonable to suppose the power to grant injunctions was meant to be nothing but a bare power, with no means of compelling obedience. Otherwise the nuisance may be continued for ever, and the plaintiff put to the necessity of bringing action after action for damages. I think it is only reasonable to interpret the words of s. 89 to mean that a county court has the same power to commit for disobedience of an injunction as the High Court has.

Notwithstanding, therefore, my reluctance to extend the power of commitment in any Court—a reluctance which I have shewn on other occasions by treating the power of the Court to commit for contempt as more limited than it was considered to be by other judges—looking at the nature of the case and the common sense of the matter, I think the county court has jurisdiction to commit for disobedience to its own injunction, and that the rule should be made absolute.

POLLOCK, B. I am of the same opinion. The first question, whether there is any power to grant an injunction (which was not raised before the county court judge) does not give rise to any great difficulty. It depends on the true construction of s. 89 of the Judicature Act, 1873. The Act of 1865, 28 & 29 Vict. c. 99,

which conferred on county courts an equitable jurisdiction, and empowered them by s. 1, sub-s. 8, to grant injunctions in certain cases does not include the present case. Then s. 89 of the Judicature Act, 1873, gave every inferior Court, as regards all causes of action within its jurisdiction for the time being, the power existing in superior Courts. It was said by the defendants that an injunction is not "a cause of action" within the jurisdiction of the county court, but I think the section must not be read with the limited meaning put upon it by the defendants. When we look at the Common Law Procedure Act, 1854, ss. 79–82, we see that an injunction is not dealt with strictly as a cause of action, but rather as a process or means of remedy. Then it was argued that the power claimed was one never before conferred on the Court, and no doubt it is one which requires discretion in exercising. A plaintiff, it was urged, may claim only a small sum of 5*l.* or 10*l.* for damages, but the injunction may have an effect on the value of the defendant's property to an extent far beyond that sum. The plaintiff's answer is that he has nothing to do with the effect it may have on the defendant's property: his damages are limited to the sum he claims. I do not think, therefore, that we can give effect to the intention of the legislature unless we hold that the county court has the power to grant such an injunction.

As to the second and more important question, whether the Court has the power to commit for disobedience, there are two propositions to bear in mind: first, that where the liberty of the subject is affected the language must be very clear and explicit to justify imprisonment; secondly, that where jurisdiction is given by statute the means of carrying it out must also be provided. I do not think that *Reg.* v. *Lefroy* (1) assists us much, nor does our decision at all interfere with that case. An account of the origin of the writ of attachment is given in C. J. Wilmot's notes to *Rex* v. *Almon* (2): "I have examined very carefully to see if I could find out any vestiges or traces of its introduction, but can find none. It is as ancient as any other part of the common law: there is no priority or posteriority to be discovered about it, and therefore cannot be said to invade the common law, but to act in an alliance and friendly conjunction with every other provision

(1) Law Rep. 8 Q. B. 134. (2) Wilmot's Op. at p. 254.

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EX PARTE MARTIN.

which the wisdom of our ancestors has established for the general good of society. And though I do not mean to compare and contrast attachments with trials by jury, yet truth compels me to say that the mode of proceeding by attachment stands upon the very same foundation and basis as trials by jury do—immemorial usage and practice; it is a constitutional remedy in particular cases, and the judges in those cases are as much bound to give an activity to this part of the law as to any other part of it."

Under these circumstances we come to s. 89 of the Judicature Act, 1873, which uses the expression "combination of remedies." Now if the county court could grant the injunction, and not the remedy for disobedience possessed by the High Court, it would not have the power to grant remedies "in as full and ample a manner" as might be done by the High Court.

It was contended that the language of this section was not so strong or comprehensive as the language of the Act of 1865, 28 & 29 Vict. c. 99, s. 1, sub-s. 8, which gave the county court "all the power and authority of the High Court of Chancery" in cases of which the present is not one; but though the language differs, it does not differ so much as to lead me to think that a different result was intended by the legislature; and the Act of 1865 shews that there was no jealousy in granting to county courts a power of attachment.

I think, therefore, that this rule ought to be made absolute.

Rule absolute. (1)

Solicitors for plaintiff: *Chester & Co., for Giles, Nuneaton.*
Solicitor for defendants: *Fluker, for Estlin, Nuneaton.*

(1) Leave to appeal was granted.

STAHLSCHMIDT *v.* WALFORD.

1879
Feb. 20.

Practice—Discontinuance of Action—Order XXIII., rule 1*—Discretion.*

After an action had been referred to an arbitrator to state a special case, and he had in the case found the facts with regard to all but a very small portion of the claim in the defendant's favour, the plaintiff applied under Order XXIII., rule 1, for leave to discontinue the action:—

Held, that leave ought not be granted.

APPEAL from the decision of Field, J., at chambers, giving the plaintiff leave to discontinue the action, on the terms that no other action should be brought in respect of the same causes of action, or against the defendant, or any person claiming through him in respect of heriot custom within the manor of Bromley, or heriot service in respect of any of the tenements mentioned in the plaintiff's particulars in the action, and that the plaintiff should pay the costs of the action.

It appeared that the plaintiff had brought an action against the defendant for preventing the seizure by the plaintiff as lord of the manor of twenty-one heriots. The plaintiff claimed to seize under an alleged custom of the manor, which gave the lord of the manor a right to take a heriot in respect of any freehold tenement of the manor upon the death of the tenant, and in the alternative the plaintiff alleged that the tenements in respect of which the seizure was made were held by heriot service. The plaintiff's particulars specified twenty-one tenements in respect of which he claimed to take heriots. The action was referred, after issue joined, to an arbitrator to state a special case, and it being found impossible to deal with the evidence in any other way, it was agreed by the parties that the arbitrator should, in stating the case, find as a fact whether the alleged heriot custom existed, and whether the tenements were held by heriot service. The arbitrator, in stating the case, found that there was no such custom, and with regard to twenty of the tenements in question, and part of the twenty-first, he found that they were not held by heriot service. As to a portion of the twenty-first tenement, he found that if a certain entry in the court rolls was evidence, it was held by heriot service, but otherwise not. The plaintiff then applied for leave

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STAHL-SCHMIDT v. WALFORD.

to discontinue the action under Order XXIII., rule 1, and on such application Field, J., had made the order appealed against.

Wills, Q.C., and *Moorsom*, moved to rescind the order. Under the old practice the Court would never grant leave to discontinue the action after a general verdict unless a rule for a new trial had been obtained: *Price* v. *Parker* (1); Chitty's Archbold, 11th ed. 1471. The finding of the arbitrator is analogous to a general verdict, and the arbitrator has found for the defendant on the claim with the exception of a very trifling portion of it. The defendant is entitled to the benefit of this finding, and it would be unjust that the plaintiff should be allowed to deprive him of it by discontinuing. The terms imposed by Field, J., are not equivalent to a judgment for the defendant on the portion of the claim the arbitrator has found in his favour, to which the defendant will be entitled if the action proceeds. The judgment will have the effect of an estoppel, and it is very important that the defendant should have a judgment the effect of which is clear and definite with regard to his title. It is submitted that the Court will in general be guided in exercising their discretion under Order XXIII., rule 1, by the old rule, which is consistent with justice.

Webster, Q.C., and *Curtis Bennett*, shewed cause. The terms imposed by the learned judge give the defendant all that he is entitled to. The plaintiff ought not to be obliged to proceed with his action provided the defendant is not unfairly prejudiced by the discontinuance. All that the defendant is entitled to is that he should get his costs, and that neither he nor any one claiming under him should be sued again in respect of the same matter. Suppose the plaintiff to have discovered fresh evidence since the hearing before the arbitrator: no doubt he ought not to be allowed to discontinue and bring a fresh action on amended materials against the defendant or any one claiming through him in respect of the same matter. But a judgment may prejudice him in other proceedings between himself and other parties in which the existence of the custom of the manor may come in question.

[They cited *Young* v. *Hitchens*. (2)]

(1) 1 Salk. 178. (2) 6 Q. B. 606.

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COCKBURN, C.J. I think the order of Field, J., ought to be rescinded. The defendant is entitled to say that he ought not to be prejudiced because of some possible use that may hereafter be made of the judgment against the plaintiff in proceedings between the plaintiff and other people. It appears to me that the hearing before the arbitrator, and his finding, were substantially equivalent to a trial at Nisi Prius and the verdict of a jury. The defendant, as it seems to me, is in justice entitled to the fruits of these proceedings, and we ought not to interfere to deprive him of them. Admitting that it is a matter of discretion under Order XXIII., rule 1, whether the plaintiff shall be allowed to discontinue, under the circumstances of this case I think, as a matter of discretion, that the plaintiff ought not to be allowed to discontinue.

MELLOR, J. I am of the same opinion. The words of the rule are that "the Court or a judge may before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action and otherwise as may seem fit, order the action to be discontinued." But the discretion thus given must be exercised within certain limitations, and so as not to take away from the defendant any advantage to which he is fairly and reasonably entitled. It seems to me that to allow the plaintiff to discontinue under the circumstances of the present case would be to deprive the defendant of what is justly his right.

Order absolute.

Solicitors for plaintiff: *Stoneham & Legg.*
Solicitors for defendant: *Taylor & Hales.*

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Feb. 25.

LAMB *v.* BREWSTER AND ANOTHER.

Property Tax—Landlord and Tenant—Deduction from Rent—5 & 6 Vict. c. 35, ss. 60, 103—Contract—Illegality.

Post 607

An agreement that, if the tenant will continue to pay his rent in full without any deduction in respect of landlord's property tax paid by him, the landlord will repay to the tenant all sums he has paid or shall pay for the landlord's property tax, is not invalid as being contrary to the provisions of 5 & 6 Vict. c. 35.

Affirmed by Ch. Cas. post 607

NOTICE in lieu of statement of claim referring to the indorsement on the writ.

From the indorsement on the writ it appeared that the claim was against the defendants as executors for a total sum of 37*l.*, made up of sums which had been paid, on various specified occasions, by the plaintiff, a tenant of the testator, in respect of landlord's property tax on the demised premises.

Statement of defence: Assuming that the property tax was paid by the plaintiff, as alleged, no demand of, or application, or request was ever made by the plaintiff for the said property tax to be paid, or allowed, or deducted out of the rent which became due and payable by the plaintiff to the testator next after each payment of the said property tax respectively; but the plaintiff made such payments of rent, without making or claiming any such deduction of the amount liable to be deducted in respect of property tax according to the statutes in such case made and provided.

Reply: That demands or requests were frequently made by the plaintiff for the said property tax to be paid, allowed, or deducted out of the rent which became due and payable by the plaintiff to the testator next after each payment of the said property tax respectively; that the said testator promised the plaintiff that if he would continue to pay the said rent in full, without deducting anything for the said payments of property tax for the testator, he the testator would repay to the plaintiff all sums which he had paid or should pay for the said property tax; and that the plaintiff did continue to pay the rent in full, yet the testator did not repay the said sums as agreed.

Demurrer.

A. P. Stone (*Meadows White, Q.C.*, with him), for the defendants, in support of the demurrer. In the case of *Denby* v. *Moore* (1) it was held that the tenant who had paid his rent in full could not afterwards recover back the amount of the property tax which he could have deducted. The grounds upon which the judgments in that case were based were that the payment was voluntary on the part of the tenant; and, secondly, that, if the tenant were allowed to go on paying his rent in full, and could afterwards recover back the amount of the tax, it would have a tendency to defraud the revenue, because if the claim of deduction had been made in the first instance the rent might have been raised, and then, as rent is primâ facie the basis of assessment, the tax would have been higher. It is contended that that decision governs this case. The agreement set up in the reply is bad, as being contrary to the policy of the Property Tax Act, and tending to defraud the revenue: see 5 & 6 Vict. c. 35, s. 60, sched. A., No. IV. If the agreement is bad, then the payments by the plaintiff were on the same footing as those in *Denby* v. *Moore* (1), and were voluntary payments. The intention of the Property Tax Act (5 & 6 Vict. c. 35), sched. A., No. IV., is that the tenant shall deduct the tax from the next rent. By s. 103 a penalty is imposed on the landlord if he endeavours to prevent such deduction, and any agreement by the tenant to pay the rent in full is made void. The agreement now in question is void under that section.

[He also cited *Cumming* v. *Bedborough.* (2)]

Day, Q.C. (*Dodd*, with him). This is not a case of voluntary payment. A voluntary payment means a payment not moved by a previous request. In the case of *Denby* v. *Moore* (1) the payment was voluntary. The agreement set out in the reply entirely distinguishes that case from the present. The sole question is whether that agreement is invalid. There is nothing in such an agreement that tends to defraud the revenue. The provisions of the 103rd section are for the protection of the tenant. Their effect is to invalidate any contract by which the burden of the tax is ultimately thrown on the tenant. But this agreement is that the landlord shall bear the tax. The agreement is not that the

(1) 1 B. & Ald. 123. (2) 15 M. & W. 438.

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tenant shall continue to pay the rent in full, but that if he continue so to pay it, the landlord will repay the amount of the tax. The effect of the agreement is really that if the plaintiff will lend the money which he might have deducted to the testator, the testator will repay it. There is nothing in any way illegal in such an agreement.

A. P. Stone, in reply.

MELLOR, J. I am of opinion that the plaintiff is entitled to our judgment. Independently of any statutory enactment, the agreement set up in the reply would be a valid agreement, made for a sufficient consideration. The question therefore is, whether it is invalidated by any statutory provision. It appears to me that the 103rd section of 5 & 6 Vict. c. 35, which has been cited as rendering this agreement invalid, is intended to apply to all agreements or bargains, the object of which is to throw the burden of the landlord's property tax on the tenant. The agreement here in question does not seem to me to come within the mischief intended to be guarded against. In the case of *Denby* v. *Moore* (1) expressions were used by the judges which have been relied upon as shewing that such an agreement as this would be a fraud on the Property Tax Act, and that if the tenant be allowed not to deduct immediately, but to go on paying for many years, and then to call on the landlord to repay him, that would have a tendency to defraud the revenue. But that case differs entirely from the present. What was there held was that when a tenant does not take the opportunity of deducting the tax, but goes on without any claim to deduct paying the full rent for a series of years, and no arrangement is made with the landlord, then the right to deduct is gone, and the payments so made by the tenant in excess of the rent he was bound to pay are voluntary payments, and cannot be recovered back. In the present case the tenant claims to deduct at the time when he is entitled so to do, and by arrangement between himself and the landlord he abstains from insisting on such deduction, and the landlord promises to repay him afterwards. It is not a case of a tenant relinquishing his lien on the rent, and

(1) 1 B. & Ald. 123.

voluntarily paying the whole without making any claim in respect of the right of deduction. It is obvious that such an arrangement is not within the scope of the dicta of the judges in *Denby* v. *Moore*. (1) The next case in which a similar question arose was *Stubbs* v. *Parsons*. (2) Holroyd, J., there says: "The occupier has, as it seems to me, a lien on the next rent given him by the legislature for the land tax paid by him; but if he parts with the rent without making the deduction he loses his lien, and has only his remedy by action or set-off." It seems clear from these observations that, if this is the correct principle, a contract between the tenant and the landlord, that if the tenant gives up his lien the landlord will subsequently repay the amount, is a contract for a perfectly valid consideration. It is not, as it seems to me, contrary to any provision of the statute.

FIELD, J. The argument for the defendants is, that there is no consideration for this agreement, and that it is illegal. With regard to the latter point the question that arises on the demurrer is, whether such a contract is necessarily illegal, no facts being pleaded tending to shew any fraud or illegality in this particular agreement, if such an agreement can be valid. In order to see whether there is any illegality in the agreement, I must look to the provisions actually made by the statute. I cannot speculate as to possible intentions of the statute not expressed by the words. The provisions of the statute seem to amount to this. The tax is made payable by the tenant, but it is to fall ultimately upon the landlord. The tenant who pays may therefore deduct the payment from his rent. If the landlord seeks to prevent him from so doing, by virtue of any agreement between them, the landlord is made subject to a penalty, and no contract made by the tenant that he will bear the tax is good. There is nothing in these provisions to invalidate an agreement by the landlord to repay the amount if the tenant will abstain from insisting on the deduction. The only ground for the contention of the defendants depends upon the expressions used by the distinguished judges who decided *Denby* v. *Moore* (1), but I am at a loss to discover, notwithstanding those

(1) 1 B. & Ald. at p. 123. (2) 1 B. & Ald. 516.

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expressions, what fraud on the revenue there can be in such an agreement as this. At the time when that case was decided much looser ideas prevailed as to supposed frauds on statutes than at the present time. Now such notions are brought much more closely to the test of the positive language used in the statutes. Before we can make out that a contract is illegal under a statute, we must make out distinctly that the statute has provided that it shall be so. Then it is said that these were voluntary payments by the plaintiff. Decisions have been cited to establish that if the tenant does not claim the deduction, but pays the rent in full without claiming any deduction, he cannot afterwards recover the amount which he might have deducted; but those decisions do not apply to a case like the present, where there was a claim of the deduction and an agreement that, if it was not insisted on, the landlord would afterwards repay the amount.

Judgment for the plaintiff.

Solicitor for plaintiff: *Marsh, for Bescoby.*

Solicitors for defendants: *Collyer, Bristowe, & Co., for Hett, Freer, Hett, & Hett.*

CREMETTI *v.* CROM.

1879
March 10.

Practice—Attachment of Debts—Order not equivalent to Judgment—Order XLII., rule 20—Order XLV., rule 2.

An order dismissing an action with costs for want of prosecution is not enforcible by attachment of debts under Order XLV., rule 2.

APPEAL from the decision of Lopes, J., at chambers.

The defendant had obtained an order dismissing the action for want of prosecution with costs. The defendant, the costs not being paid, applied at chambers, under Order XLV., rule 2, for an order for attachment of debts due to the plaintiff to satisfy the costs. The application was refused by Lopes, J.

Aspland, moved by way of appeal against the decision. By Order XLII., rule 20, "every order of the Court or a judge, whether in an action, cause, or matter, may be enforced in the same manner as a judgment to the same effect." Order XLV. provides for the enforcement of a judgment by attachment of debts.

[COCKBURN, C.J. The provision does not make an order equivalent to a judgment.

MANISTY, J. The 2nd rule of Order XLV. enacts that the attachment may be ordered upon the affidavit of the party or his solicitor that judgment has been recovered. No such affidavit could be made in this case.]

The rule must be read as if "judgment" included "order." The case of *Re Frankland* (1) is distinguishable, because in that case the Act that gave a rule the effect of an order was anterior to the provision of the Common Law Procedure Act, 1854, which provided for the attachment of debts by way of execution. Here both provisions are contained in the same Act. [He also cited *Best* v. *Pembroke*. (2)]

COCKBURN, C.J. We are of opinion that the application should not be granted. The 20th rule of Order XLII. does not say that the order shall constitute a judgment, but only that it shall be enforcible in the same way. The provisions with respect to

(1) Law Rep. 8 Q. B. 18. (2) Law Rep. 8 Q. B. 363.

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attachment of debts and the machinery given by them apply to judgments only. We do not think that it was intended that orders should for all purposes be equivalent to judgments.

MANISTY, J. I am of the same opinion. One test is whether the affidavit required by Order XLV., rule 2, can be made. It clearly cannot.

Rule refused.

Solicitor for defendant: *R. H. Davies.*

March 17.

GREAVES *v.* FLEMING.

Practice—Costs — Money paid into Court—Acceptance of in Satisfaction — Order XXX., rule 4 ; *Order LV., rule* 1.

The defendant paid money into court in satisfaction of the plaintiff's claim, and gave notice of such payment to the plaintiff. The plaintiff did not give notice to the defendant that he accepted the money so paid in satisfaction of the claim within four days, as required by Order XXX., rule 4, but he afterwards accepted that sum in satisfaction:—

Held, that an order might be made giving the plaintiff his costs under Order LV., rule 1.

APPEAL from the decision of Field, J., at chambers.

The action was brought to recover the sum of 50*l.* The defendant before delivering a defence paid into court the sum of 30*l.* 14*s.* 8*d.* in satisfaction of the claim, and gave notice of such payment to the plaintiff. The plaintiff did not give notice that he accepted the amount paid in satisfaction within four days, as required by Order XXX., rule 4, but he afterwards accepted that sum in satisfaction, and applied at chambers for an order upon the defendant to pay the costs of the action. Field, J., made an order as prayed for.

Edward Pollock, moved to rescind the order. The only enactment by which the plaintiff is entitled to costs, on taking out money paid into court in satisfaction, is Order XXX., rule 4. Under that rule the plaintiff, in order to get his costs, must give notice that he accepts the sum paid in satisfaction within four days. Order LV., rule 1, does not apply to the case where money is paid into court.

Lumley Smith, shewed cause. It cannot be intended that if the four days are allowed to elapse the plaintiff shall absolutely and irretrievably lose his costs. It may be that the plaintiff may not have an absolute right to costs if he do not comply with Order XXX., rule 4, but it is submitted that the Court or a judge still has a discretion to allow the costs under Order LV., rule 1.

COCKBURN, C.J. I think in this case our judgment should be for the plaintiff. I confess I come to this conclusion with some hesitation, for the language of the rules is very ambiguous. On the whole, however, I think that the effect of Order XXX., rule 4, and Order LV., rule 1, taken together, is this. If the plaintiff follows the course pointed out in Order XXX., rule 4, he acquires an absolute right to costs; if the plaintiff does not comply with Order XXX., rule 4, but takes out the money in satisfaction at a later period than the four days, still I think the plaintiff may have his costs under Order LV., rule 1. It is clear that he may take out the money paid into court in satisfaction at a later date than the four days. The only result, in my opinion, is that, if so, he loses his absolute right to costs, but he may apply for his costs under Order LV., and then his right to them will be subject to the exercise of the judge's discretion, with reference to any circumstance of prejudice to the defendant from the delay on the plaintiff's part, as for instance if the defendant has been led to take any further steps in the action. On these grounds, I think that Field, J., had power to make the order giving the plaintiff his costs.

MELLOR, J. I am of the same opinion. The construction of the rules contended for by the plaintiff's counsel, appears to me more reasonable than the construction by which, if the plaintiff allows the period of four days to go by, his right to costs is irretrievably gone. I think that the effect is that his absolute right to costs is gone, but that he may still apply for costs under Order LV., and then the judge will have a discretion in the matter with regard to the particular circumstances.

Rule refused.

Solicitor for plaintiff: *H. H. Maude.*
Solicitors for defendant: *Wright & Son.*

Applied. CORKERY v. CARPENTER. [1950] 2 All E.R. 745.

Applied. CORKERY v. CARPENTER [1951] 1 K. B. 102

1879 TAYLOR, APPELLANT; GOODWIN, RESPONDENT.

March 25.

Highway—Furious driving on—Highway Act (5 & 6 *Wm.* 4, *c.* 50), *s.* 78—"*Carriage*"—*Bicycle.*

A person, riding a bicycle on a highway at such a pace as to be dangerous to the passers by, may be convicted of furiously driving a carriage, under 5 & 6 Wm. 4, c. 50, s. 78.

CASE stated by justices under 20 & 21 Vict. c. 43.

An information had been preferred by a police inspector against the appellant, under 5 & 6 Wm. 4, c. 50, s. 78, for furiously driving a carriage on a highway. It appeared that the appellant had been riding a bicycle on a highway at a furious pace on the occasion in question. It was objected before the justices that a bicycle was not within the provisions of the section. The justices convicted the appellant, and the question was raised whether they were justified in convicting him under the circumstances.

Rose, for the appellant. A bicycle is not a "carriage" within the meaning of the Act, nor can it be said to be "driven" in the ordinary sense of the term. Bicycles were unknown when the Act was passed. The Act refers to carriages drawn by horses or other animals. See the preamble and ss. 24 & 76. A person is never said to "drive" a bicycle. The fact that a bicycle has wheels does not make it a carriage. A bath-chair or a wheelbarrow would not be a carriage within the Act. It would be far too wide a construction to hold that every apparatus by which a man is carried is a "carriage." Wheeled skates would be a carriage under such a construction. [He cited *Reg.* v. *Bacon* (1); *Williams* v. *Evans* (2); *Reg.* v. *Mathias.* (3)]

Gorst, Q.C., for the respondent. The words of the section are "any sort of carriage." The person propelling the bicycle "drives" it. He guides the machine and regulates its pace. Such a machine is clearly within the mischief of the Act.

MELLOR, J. I am of opinion that the decision of the magis-

(1) 22 L. T. (N.S.) 627. (2) 1 Ex. D. 277.
(3) 2 F. & F. 570.

trates was right. The words of the section are, "if any person riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously so as to endanger the life or limb of any passenger." The expressions used are as wide as possible. It may be that bicycles were unknown at the time when the Act passed, but the legislature clearly desired to prohibit the use of any sort of carriage in a manner dangerous to the life or limb of any passenger. The question is, whether a bicycle is a carriage within the meaning of the Act. I think the word "carriage" is large enough to include a machine such as a bicycle which carries the person who gets upon it, and I think that such person may be said to "drive" it. He guides as well as propels it, and may be said to drive it as an engine driver is said to drive an engine. The furious driving of a bicycle is clearly within the mischief of the section, and seems to me to be within the meaning of the words, giving them a reasonable construction.

LUSH, J. I am of the same opinion. The mischief intended to be guarded against was the propulsion of any vehicle so as to endanger the lives or limbs of the passers by. It is quite immaterial what the motive power may be. Although bicycles were unknown at the time when the Act passed, it is clear that the intention was to use words large enough to comprehend any kind of vehicle which might be propelled at such a speed as to be dangerous.

Conviction affirmed.

Solicitor for appellant: *S. F. Langham.*
Solicitor for respondent: *Solicitor to the Treasury.*

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March 27.

TOMLINSON, APPELLANT; BULLOCK, RESPONDENT.

Statute, Construction of—Time of coming into Operation—Bastardy—35 & 36 *Vict. c.* 65, *s.* 3; 36 *Vict. c.* 9, *s.* 3.

16 Q.B.D. 576, 14 Q.B.D. 152

The 35 & 36 Vict. c. 65, s. 3, provides for an application for an order of affiliation by any single woman who may be delivered of a bastard child "after the passing of this Act." The Act, which came into immediate operation, received the royal assent on the 10th of August, 1872:—

Held, that an order of affiliation might be made under the Act in respect of a child born at any time of the day on the 10th of August, 1872, inasmuch as the Act in contemplation of law for this purpose came into effect from the commencement of the day on which it received the royal assent.

CASE stated by justices under 20 & 21 Vict. c. 43.

The facts sufficiently appear from the judgment.

March 25. *Lockwood*, for the appellant, contended that the statute 35 & 36 Vict. c. 65 must be taken to have come into force from the commencement of the day on which it received the royal assent, and therefore that the child was in contemplation of law born after the passing of the Act. He cited Maxwell on Statutes, p. 311; *Combe* v. *Pitt* (1); *Campbell* v. *Strangeways*. (2)

Crompton, for the respondent, contended that the statute did not come into effect until the day after it received the royal assent. He cited 33 Geo. 3, c. 13.

Cur. adv. vult.

March 27. The judgment of the Court (Mellor and Lush, JJ.) was delivered by

LUSH, J. This is an appeal from the decision of justices dismissing an application for an order under the Bastardy Acts. The application was made on the 5th of September, 1872, but by reason of the absence of the respondent from England the summons was not taken out till the 26th of July, 1878. It appeared on the hearing that the child was born on the 10th of August, 1872, being the day on which 35 & 36 Vict. c. 65 received

(1) 3 Burr. 1424, at p. 1434. (2) 3 C. P. D. 105.

the royal assent. That Act, which came into operation immediately on its passing, repealed 7 & 8 Vict. c. 101, and enacted other provisions in lieu thereof. The 3rd section enacts that "any single woman who may be delivered of a bastard child *after the passing of this Act* may either before the birth, or at any time within twelve months from the birth of such child, or at any time thereafter, upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance, or at any time within the twelve months next after the return to England of the man alleged to be the father of such child upon proof that he ceased to reside in England within the twelve months next after the birth of such child make application," &c.

The repealing clause excepted anything theretofore duly done under the repealed Act, and kept the latter Act alive for the purpose of supporting and continuing any proceeding taken before the passing of the Act in question, but it made no provision as to children born before its passing, and in respect of which no proceeding had been taken, consequently the mother of a child born on the 9th of August, 1872, had no remedy under the Act then in force (7 & 8 Vict. c. 101), because that Act was repealed on the following day, and no remedy under the repealing Act, because that applied only to children born after its passing. To supply this defect another Act was passed at the commencement of the following session, the Act 36 Vict. c. 9. The 3rd section of that Act enacts that "any woman delivered of a bastard child on or before the 10th of August, 1872 (the day on which the repealing Act was passed), who but for the repeal by the last-mentioned Act would have been entitled to apply for a summons against the putative father of such child, shall be entitled to apply for such summons as follows:—In any case in which she would have been entitled to apply at any time within twelve months from the birth of the child she shall be entitled to apply at any time within six months next after the passing of this Act." If 7 & 8 Vict. c. 101, had not been repealed the applicant would have been entitled to apply for a summons within twelve months from the birth of the child. She might, therefore, have availed herself of the amending Act by applying

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16 L.D. 575

within six months after its passing, but she did not do so; and although that Act in the 8th section rendered valid all orders made in respect of children born before the 10th of August, 1872, it says nothing of pending applications, nor does it say anything in respect of children born not before but on the day on which the Act of 1872 passed. It seems to have been assumed on all hands that a child born *on* the 10th of August was not within the Act of 1872, and the justices upon this assumption considered that, as the applicant had not brought herself within the remedial Act of 1873, she had no locus standi. If this assumption were well founded we should be of opinion that the decision was right. But we think that it is an erroneous assumption.

At common law all statutes passed in a session of parliament had relation back to the first day of the session, unless some other day was appointed for the Act coming into operation. This relation was productive of most serious consequences, many instances of which are found in the books; and in the 33rd year of the reign of Geo. III., an Act was passed which required the clerks of the parliaments to indorse on every Act, the day, month, and year, when the same received the royal assent, and enacted that such indorsement should be taken as part of the Act, and should be the date of its commencement where no other commencement was provided.

The only point of time which this Act makes material is the day on which the royal assent was given. It thus recognizes the well known maxim that the law takes no notice of the fractions of a day, and except where there are conflicting rights between subject and subject, for the determination of which it is necessary to ascertain the actual priority, such is the universal rule—an Act which comes into operation on a given day becomes law as soon as the day commences.

By the operation of the repealing clause of the Act of 1872, the Act of 7 & 8 Vict. c. 101, was repealed, and the new Act came into effect at the first moment of the 10th of August, 1872. Every event which occurred during that day was in contemplation of law an event which took place after the passing of the Act. The same maxim it is true applies to the birth of a child. In computing the age of a person, the day and not the hour of his birth

is regarded where no conflicting right is in question. A person born on the 3rd of September was held to be of age on the 2nd of September, twenty-one years afterwards, without regard to the fractions of the days. (1) But on the other hand a fiction of law is not allowed to prevail against the plain intent of an Act. Now, it is clear that the Act of 1872 was not intended to deprive the mother of a child born *on* the day on which it passed of all remedy against the putative father. It intended to substitute another remedy for that which it took away, and if that intent can be effectuated without violence to its language, our duty is so to construe the Act as to carry out that intent. We do no violence to its language by holding that a child born at any time during the 10th of August, was born "after the passing of the Act," which in contemplation of law took place as soon as the clock began to strike twelve in the night of the 9th of August.

We are, therefore, of opinion that the decision of the justices was erroneous, and we remit the case to them to be determined upon the merits.

Case remitted to justices.

Solicitor for appellant: *G. B. Wheeler.*
Solicitor for respondent: *Backhouse.*

HOYLE, APPELLANT; HITCHMAN, RESPONDENT.

March 28.

Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), s. 6—"*Prejudice of the Purchaser*"—*Purchase of Sample for Analysis by Officer.*

Where an article of food, which was not of the nature, substance, and quality of the article demanded, was sold to an inspector of nuisances, who purchased for the purpose of analysis under s. 13 of the Sale of Food and Drugs Act, 1875, with money belonging to the authority by whom he was employed:—

Held, that such sale was "to the prejudice of the purchaser" within the meaning of the Sale of Food and Drugs Act, 1875, s. 6.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43, the facts of which were in substance as follows:—

An information had been preferred against the respondent for

(1) 1 Ld. Raym. 480.

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an offence under the 6th section of the Sale of Food and Drugs Act, 1875, by the appellant, an inspector of nuisances for the district of St. Giles, who had been duly authorized to act in the execution of the Act. The appellant had gone to the respondent's shop and asked for half a pint of milk, for which he paid $1\frac{1}{2}d.$, out of money provided for the purpose by the local authority, for which he had to account. On being served, he informed the shopman that he was an inspector of nuisances, and had purchased the milk for analysis. The various provisions of the Act with regard to the mode of procedure in such cases having been previously complied with, the milk supplied was analysed by the public analyst. It was found to contain 24 per cent. of water added to the milk after it had come from the cow.

The appellant, in cross-examination, stated that he was not prejudiced, nor was any injury done to him personally, and it was thereupon submitted that there was no offence because the milk was not sold to the prejudice of the purchaser. The magistrate found that the appellant demanded milk, that the article sold was not of the nature, substance, and quality of milk, and that the appellant had no knowledge or notice that the milk the respondent sold was adulterated. He also stated that if the purchaser had been one of the respondent's ordinary customers the offence mentioned in the Act would, in his judgment, have been committed. But he declined to convict, on the ground that the sale was not "to the prejudice of the purchaser" within the meaning of the 6th section of the Act. The question for the opinion of the Court was whether he was right in so declining to convict, and if not the case was to be remitted to him to deal with in accordance with the judgment of the Court.

March 26, 27. *Poland*, for the appellant. It is quite obvious, on consideration of the provisions of ss. 13–17 of the Act, that the inspector is authorized by the Act to purchase for the purpose of analysis, and to prosecute, if on such analysis, the article is found to be adulterated. The prejudice intended is not necessarily pecuniary or personal prejudice. The legislature never intended an inquiry into the purposes for which a purchase is made, or the question with whose moneys it is made, in order to see whether

prejudice exists. The words "to the prejudice of the purchaser" are introduced to prevent the sale of an article superior to that demanded being an offence. [He cited *Sandys* v. *Markham*. (1)]

Morton Smith, for the respondent. The contention for the appellant gives no real effect to the words "to the prejudice of the purchaser." In the case of *Davidson* v. *MacLeod* (2)—the majority of the High Court of Justiciary in Scotland decided a similar case in accordance with the present contention on behalf of the respondent. [He also cited *Sandys* v. *Small*. (3)]

Cur adv. vult.

March 28. MELLOR, J. This is an appeal from the decision of the chief magistrate at Bow Street, and the question raised is whether an offence had been committed within the provisions of the 6th section of the Sale of Food and Drugs Act.

The magistrate dismissed the summons on the ground that there was no prejudice to the purchaser. This gives rise to the question whether the prejudice contemplated by the statute must be pecuniary prejudice. Such a reading would almost nullify the beneficial effect of the statute, for it would very much diminish the possibility of bringing home offences against the Act to those who are guilty of them. This to my mind affords a strong argument against such a contention. So far as authority is concerned, I do not think that there is any distinct authority on the point to be found in any case that has been decided in the English Courts. The cases to which we have been referred in these Courts are two in number. One is the case of *Sandys* v. *Markham* (1), which came before my Brother Lush and myself. The Court remitted the case to the magistrate, and it can hardly be treated as a decision. But undoubtedly during the argument my Brother Lush expressed an opinion that if an article, the value of which had been diminished by adulteration, were sold, prejudice was to be presumed. To that view I must have assented, because otherwise it would have been useless to have sent the case back to the magistrate, as the objection that the sale was not to the prejudice

(1) 41 J. P. 52.

(2) Cases decided in the High Court of Justiciary, 4th Series, vol. v. p. 1.

(3) 3 Q. B. D. 449.

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of the purchaser would have been fatal if it could have been sustained. The other case is that of *Sandys* v. *Small*. (1) It was stated that during the argument of that case observations fell from the Lord Chief Justice favourable to the respondent's contention in the present case. I think those observations if they were made were rather in the nature of a query than a dictum. There was no further discussion on the point, and the judgment turned on an altogether different point. There is nothing whatever in the observations contained in the judgment that gives any colour to the notion that either the Lord Chief Justice or myself entertained an opinion that the objection so taken was a good one. Such, therefore, is the state of the English authorities. There is nothing that supports the respondent's contention, and there is a dictum against it. We have been referred to a case in the Scotch Courts, viz., that of *Davidson* v. *MacLeod* (2), where the High Court of Justiciary were sitting as a Court of Appeal from the decision of an inferior Court. Had the opinion of the judges in that case been uniform, and had there not been a considerable difference of opinion on this particular point, I should have been very reluctant to decide contrary to the authority of that case. The judgments deal with two points, the first being what the nature of the adulteration is that constitutes an offence under the Act. Some of the judges were of opinion that the admixture of some foreign substance was necessary to constitute an offence, and that mere weakness of quality would not do so. The sheriff had held that the clause might be read disjunctively, and that it was sufficient if the article sold was not of the "quality" demanded. The majority of the judges were not of this opinion. It is not necessary to decide this point, and I do not wish to be considered as expressing any binding opinion upon it, but as at present advised, I am disposed to think that on this point the majority of the learned judges were right. The second point raised was as to the prejudice to the purchaser. On that point there was a very great difference of opinion among the different members of the Court. The Lord Justice Clerk undoubtedly was of opinion that the sheriff was wrong on both points. Lord Deas expresses very great doubt

(1) 3 Q. B. D. 449.

(2) Cases decided in the Court of Justiciary, 4th Series, vol. v. p. 1.

with regard to the second point. Two of the judges, Lord Craighill and Lord Adam, dissented from the opinion of the majority, and thought that the decision of the sheriff-substitute was right. The Lord Justice General's judgment on the second point seems to me rather in favour of the view we are now taking. He says that the sale must be proved to be to the prejudice of the purchaser, but that he is not prepared to say it must be to his pecuniary prejudice. There being this diversity of opinion, I am not so much pressed by the authority of the case as I otherwise should be, and with very great respect to the learned judges who formed the majority of the Court, I cannot treat the case as a conclusive decision on the point now before us. We must, therefore, consider the language of the statute, and it seems to me, I must say, from some of the expressions let fall by the Scotch judges that they took too narrow a view of the scope of the 6th section. It is perfectly general in its terms, and is not in any way confined to cases where there has been an admixture of a deleterious character. In the 13th, 14th, and 17th sections express provisions are made whereby the officer appointed for the purpose may compel a sale to him for the purpose of analysis, in order that offences may be detected and prosecuted. The appellant in the present case acted under those sections, and it seems to me that we must look upon a purchase by an officer so proceeding precisely in the same manner as a purchase by any other individual. If a person comes to a shop and asks for some article of food, and receives something adulterated so as not to be of the nature, substance, and quality of the thing demanded, surely an offence is committed, and it cannot matter with regard to the commission of such an offence whether the money with which the purchase was made is public money found for the purpose of the purchase or not. If a purchaser, whoever he may be, and with whosesoever money he may purchase, gets an article inferior to that which he demands and pays for, it seems to me that he is necessarily prejudiced within the meaning of the section. The statute never intended the fact that a person purchases with another's money to be material. The real offence is the fraudulent sale of an article adulterated so as to be of an inferior nature, substance, and quality to that which is demanded and paid for. The necessity

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for the words, "to the prejudice of the purchaser" is this. But for these words various absurdities might arise on the words of the section. The sale of an article of a superior nature or quality to that demanded would be an offence. For these reasons I am of opinion that the decision of the magistrate was wrong, and that the case must go back to him to be dealt with in accordance with our opinion.

LUSH, J. The language of the 6th section of the Sale of Food and Drugs Act has unfortunately given rise to a diversity of opinion, which I fear has to some extent crippled the operation of a very beneficial Act. The learned magistrate certainly had the sanction of high authorities for the view he took. The majority of the judges of the High Court of Justiciary in Scotland took the same view. An impression has also gone abroad that the Lord Chief Justice, in the case of *Sandys* v. *Small* (1), threw out a similar view. The only reports of the case that I am aware of contain no trace of such an opinion on the Lord Chief Justice's part. In the report, at p. 451, the Lord Chief Justice is reported as asking, as an interlocutory question, whether the purchaser can be said to be prejudiced when he knows of the adulteration; and the question in the case was whether the purchaser had notice of the admixture of other ingredients, and, if so, whether he was prejudiced. The judgment wholly turned on this point, which is quite distinct from the point now before us. On the other hand, my Brother Mellor and myself, in the case of *Sandys* v. *Markham* (2), obviously considered it quite immaterial for what purpose the article was bought, and with whose money. If we had not thought so, it would have been useless to send the case back to the magistrate. These are the only cases that have occurred in the English courts. Our attention was directed yesterday to the judgments of the High Court of Justiciary in Scotland in the case of *Davidson* v. *MacLeod*. (3) I have studied those judgments with attention and deference, but I am unable to concur with the opinion of the majority on this point. The decision itself seems to me to be correct. The article there demanded and supplied

(1) 3 Q. B. D. 449.
(2) 41 J. P. 52.
(3) Court of Justiciary, 4th Series, vol. v. p. 1.

was cream. It was admitted that it contained no foreign admixture or adulteration, but it was cream of an inferior quality to that ordinarily sold in Glasgow. Cream is not an article having any standard of quality. It varies with the character of the cows from which the milk comes, and the food on which they are fed. This was genuine cream, though of inferior quality. It appears to me that the sale in such a case was not an offence within the Act at all. In the present case the article demanded was milk; that supplied was milk and water. It was an adulterated article. The magistrate says that if the purchase had been made by an ordinary customer he should have had no hesitation in convicting. The question therefore is whether it can make any difference that the person purchasing was an official person, authorized to purchase for the purpose of testing the character of the article sold at the respondent's shop. The learned magistrate thought that the section could not apply to an official purchaser who bought for analysis only, because he was not prejudiced. I cannot in any way concur in that opinion. In construing the 6th section we must bear in mind the object of the Act. This object was to prevent the public from being imposed upon by the sale of adulterated articles, and to provide a mode of ascertaining whether such adulteration exists. For this purpose a machinery is provided for the purchase and analysis of samples, and for taking proceedings thereon. The 13th section provides for the purchase of samples by an official personage. Provision is there made for what is to be done if it is intended to submit the sample for analysis. The 17th section makes it an offence to refuse to sell any article to the official person. All this is done in the interests of the public, the object being to ascertain what kind of article is supplied at the particular shop to the customers. The officer is to go and purchase a sample like any other customer. The 20th section provides what is to be done afterwards. The officer being the person directed by the Act to procure the sample and to have it analysed, and to whom the seller is bound to sell for the purpose of analysis, the 20th section provides that the person causing the analysis to be made may take proceedings for *such* offence. What offence? Clearly the offence of selling the article which on analysis has proved to be adulterated. It is obvious to

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my mind that the officer is a purchaser within the meaning of the 6th section, for he is the person who is directed to purchase, and procure an analysis, and to prosecute. I confess I cannot follow the reasoning on behalf of the respondent.

The Lord Justice Clerk appears to have thought that the 13th and 16th sections only applied to sales contrary to the provisions of the 3rd and 4th sections. They apply no doubt to sales within those sections, but their terms are quite general, and they apply also to sales within the 6th section. They authorize a purchase by the officer for the purpose of analysis, in order to ascertain whether there has been any violation of the Act whatever. It appears to me to be clear to demonstration that the official purchaser is within the 6th section. What is the meaning of "prejudice" here? It cannot be confined to pecuniary prejudice, or prejudice arising from the consumption of unwholesome food. The prejudice is that which the ordinary customer suffers, viz. that which is suffered by any one who pays for one thing, and gets another of inferior quality. The official purchaser is to purchase by way of testing whether the prejudice is suffered by the ordinary customer, and he is prejudiced in the same manner. The words "to the prejudice of the purchaser" are necessary, because if they had not been inserted a person might have received a superior article to that which he demanded and paid for, and yet an offence would have been committed. The words are intended to shew that the offence is not simply giving a different, but giving an inferior, thing to that demanded and paid for. It appears to me that the prejudice the Act intends is the general prejudice done to customers. The official personage is made, as it were, an official customer to test what the course of business at the particular shop is. I regard with the highest respect the judgment of the Scotch judges, but I am irresistibly led to the conclusion that every part of the 6th section is intended, as well as the 3rd and 4th sections, to apply to a person authorized to buy samples for analysis. I am anxious to guard myself from being supposed to express any opinion that the Scotch judges were right in holding that the 6th section applies only to an admixture of foreign ingredients. The question whether that is so does not arise here. There is a difference of character in various articles, such as rice or arrow-

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root, according to the country from which they come, and other circumstances. I do not decide whether if a person sold Indian rice when he was asked for Carolina rice, such a case as that would be within the section. The section, it must be observed, is not in terms confined to cases of admixture. I entertain no doubt, however, that by the word "purchaser" the 6th section intended to include an official purchaser authorized to purchase for analysis. The magistrate was therefore wrong, and the case must be remitted to him to be further dealt with in accordance with our decision.

Case remitted to magistrate.

Solicitor for appellant: *J. H. Jones.*
Solicitor for respondent: *W. T. Ricketts.*

MELLOR, APPELLANT; DENHAM, RESPONDENT.

March 29.

Elementary Education—School Board—Bye-laws—Attendance of Child at School—Factory, Child employed in—Elementary Education Act, 1870 (33 & 34 *Vict.* c. 75), *s.* 74.

A school board is not entitled to enforce the provisions of its bye-laws, with regard to the hours of attendance of children at school, in the case of children employed in factories who are attending efficient elementary schools pursuant to the Factory Acts.

The Elementary Education Acts do not control the provisions of the Factory Acts regulating the education of children employed in accordance with those Acts.

CASE stated by justices under 20 & 21 Vict. c. 43.

The justices had dismissed an information preferred by the appellant, the clerk to the Oldham School Board, against the respondent for contravening the bye-laws of the school board of the borough of Oldham, by neglecting to cause a child to attend school the whole of the ordinary school hours as required by the said bye-laws, and the case was stated to raise the question whether their decision was correct.

The facts and arguments sufficiently appear from the judgment.

March 25, 26. *Hamilton*, for the appellant, relied on the case of *Bury* v. *Cherryholm.* (1)

(1) 1 Ex. D. 457.

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Aspland, for the respondent.

The following enactments were referred to during the argument: Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 74; Elementary Education Act, 1876 (39 & 40 Vict. c. 79), ss. 5, 8; Factory Act, 1844 (7 & 8 Vict. c. 15), ss. 31, 38; Factory Act, 1874 (37 & 38 Vict. c. 44); Factory and Workshop Act, 1878 (41 Vict. c. 16), s. 23.

Cur. adv. vult.

March 29. The judgment of the Court (Mellor and Lush, JJ.) was delivered by

LUSH, J. We have gone through the various Factory Acts, and the Education Acts, and the result is that we entertain no doubt that the decision of the justices, the propriety of which is submitted to us, was substantially correct.

The question in this case, which undoubtedly is one of great and general importance, arose out of an information laid against the father of a boy between ten and eleven years old, for neglecting to cause him to attend school during the whole of the ordinary school hours, as required by the bye-laws of the school board for the district of the borough of Oldham.

The defence set up was that the boy was employed at a cotton factory in Oldham, and was regularly attending an efficient elementary school pursuant to the Factory Acts, and this the justices found to be the fact. The bye-laws of the school board, which were put in evidence at the hearing, contained an express enactment, that nothing therein should have any force or effect in so far as it might be contrary to anything contained in any Act for regulating the education of children employed in labour; thus following the words of the proviso in the 74th section of the Elementary Education Act, 1870, which prohibits the making of any bye-law which shall be contrary to any such Act.

We observe here in passing, that the finding of the justices, that the bye-laws were ultrà vires, cannot be sustained. They are in our opinion strictly within the powers conferred on the board by the 74th section, inasmuch as they contain the enactment above mentioned, together with the other provisions required by that section. The question is as to the meaning of the enactment

above quoted, and its application to the state of facts found by the justices.

The contention on the part of the school board was that the Education Acts overrode and controlled the provisions of the Factory Acts; and that children employed in factories, though receiving the education provided for and required by the Factory Acts, were in the same position as other children not so employed, and were like them compellable to attend school during the whole of the school hours. The argument in support of this contention was, that the Factory Acts, which commenced at a time when no scheme of general education existed, are merely restrictive; that they do not enact that children shall or may be employed for a given number of hours in the factory, and while so employed shall receive a certain amount of education, but that all which they enact is that the children shall not be employed for a longer time in the factory, and shall not during such employment receive less than the given amount of education; that the policy of the Education Act, which passed long afterwards, was to secure to all children, however employed, a much larger amount of education than the Factory Act provided, and that it cannot be said to be "contrary to" the provisions of the Factory Acts, for the school board to require that all children should attend school for a longer period than factory children had been required to attend, although the effect might and would be virtually to put an end to child labour in factories. What the construction might have been, if the Education Acts had made no reference to the Factory Acts, it is needless to consider. The meaning of the 74th section of the Education Act, 1870, already adverted to, does not appear to us to admit of a doubt.

That section says that the school board may make bye-laws for the following purposes, amongst which purposes is the following, namely, "Determining the time during which children are to attend school;" to which is added a proviso that "no such bye-law shall prevent the withdrawal of any child from any religious observance or instruction in religious subjects, or shall require any child to attend school on any day exclusively set apart for religious observance by the religious body to which his parent belongs, or *shall be contrary to anything contained in any Act for*

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regulating the education of children employed in labour." Placed thus as a limitation of the power of fixing the time of school attendance, the meaning of this part of the proviso obviously is, that the board shall not use the power given to them so as to interfere with the arrangements already made by the Factory Acts, which arrangements embrace both the time of working and the time of attending school, each being dependent on the other, and neither of which can be interfered with without disturbing the other.

That this was the meaning intended, is further shewn by the later Acts. The Education Act of 1876 recognises the Factory Acts as an existing code for regulating the *employment and education* of children employed in factories; and the Factory Act of 1874, while it gives the Education Department the power to recognise or to refuse to recognise a school as a proper school for the education of a factory child, says in terms, in another part of the Act, that a child employed in a factory shall attend school in manner directed by the Factory Act, 1844.

We are therefore of opinion that the justices were right, and we answer the questions submitted to us in the terms in which they are put, as follows:

1st. The school board are not entitled to enforce their bye-laws against children between the ages of ten and thirteen years, who, although not obeying such bye-laws, are attending efficient elementary schools pursuant to and otherwise fulfilling and observing the conditions of the Factory Acts.

2nd. The Elementary Education Acts do not control the provisions of the Factory Acts regulating the education of children employed in accordance with those Acts.

Judgment for the respondent.

Solicitors for appellant: *Chester & Co., for Ponsonby.*
Solicitors for respondent: *Chester & Co., for H. Booth.*

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Feb. 27, 28; *March* 8.

Ecclesiastical Law—Church Discipline Act (3 & 4 *Vict. c.* 86), *s.* 3—"*It shall be lawful*"—*Statute, Construction of*—*Words importing Obligation*—*Obligation on Bishop to issue Commission on Complaint of Ecclesiastical Offence against Clerk*—*Public Worship Regulation Act*, 1874 (37 & 38 *Vict. c.* 85).

The Church Discipline Act (3 & 4 Vict. c. 86), s. 3, enacts that, "in every case of any clerk in holy orders of the United Church of England and Ireland, who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, *it shall be lawful* for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or, if he shall think fit, of his own mere motion, to issue a commission under his hand and seal to five persons, of whom one shall be his vicar-general, or an archdeacon, or rural dean within the diocese, for the purpose of making inquiry as to the grounds of such charge or report:"—

Held, that the above enactment does not confer a discretion on the bishop, but imposes on him an obligation to proceed when complaint is made to him against a clergyman in respect of that which constitutes a sufficient ecclesiastical offence:

Held, also, that the above enactment is not affected by the provisions of the Public Worship Regulation Act, 1874.

APPLICATION for a writ of mandamus commanding the Bishop of Oxford, pursuant to the provisions of 3 & 4 Vict. c. 86, either to issue a commission under his hand and seal for the purpose of making inquiry as to the grounds of the charge preferred by Frederic Guilder Julius against the Reverend Thomas Thelluson Carter, rector of the parish of Clewer, in the county of Berks, or to send the case by letters of request to the Court of Appeal of the province, to be there heard and determined according to the law and practice of the Court.

The facts sufficiently appear from the judgment.

A rule nisi for a mandamus having been obtained,

Feb. 27, 28. The *Bishop of Oxford*, in person, shewed cause. The 3rd section of the Church Discipline Act (3 & 4 Vict. c. 86) does not make it obligatory upon the bishop to take action upon the complaint. The words "it shall be lawful," may imply a discretion or an obligation, according to the context and the purview of the

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Act. It cannot be intended that in the case of a mere scandal the bishop should be obliged to act upon the application of a party complaining, which would be the result if the construction contended for by the prosecutor was correct. The words "if he think fit," in the second branch of the sentence, may be treated as mere surplusage. It is submitted that it would be a strained construction to hold that they import that in the first branch of the sentence the words "it shall be lawful" constitute an obligation. The words "it shall be lawful" may no doubt create an obligation where the power given concerns the requirements of justice or the public interest, but it is contended that such is not the case here. It is not necessarily in the interests of justice or of the public that a deviation from correct ritual should be prosecuted. The alleged offence may be trivial. The party complaining might not be bonâ fide aggrieved. It might be injurious to the best interests of religion that there should be continual litigation and strife, promoted by extreme partizans on one side or the other in respect of comparatively unimportant matters, and frequently such prosecutions might produce the contrary result from that intended, by exciting sympathy with the offending parties. It would be most disastrous that the bishop should have no discretion, but be placed in a merely ministerial position for the purpose of forwarding the complaint. The party complaining may not be a proper person to proceed with regard to his capacity to pay costs, and in other respects. It is also contended that the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), which provides for certain offences against the established ritual, and which requires the complaint to be by the archdeacon or a churchwarden, or three parishioners, has superseded, for the purposes of the prosecution of such offences, the provisions of the Church Discipline Act.

Charles, Q.C., and *Dr. Phillimore*, appeared for the Rev. Thomas Thelluson Carter (1).

Previously to the Church Discipline Act there was a discretion

(1) Some discussion arose as to whether, notice of the rule having been served on Mr. Carter, he was entitled to be heard by his counsel, and the practice appeared doubtful, but the Court determined to hear counsel, expressly stating that the course taken must not be treated as a precedent.

whether the promoter should be allowed to proceed or no: *Sherwood* v. *Ray* (1); *Lee* v. *Matthews.* (2)

[COCKBURN, C.J. It may be that if the alleged offence was frivolous the bishop could not be compelled to proceed. The position the bishop has taken up is that, though a substantial offence be shewn, the bishop for collateral reasons may refuse to proceed.]

In *Elphinstone* v. *Purchas* (3) the fact that there is a discretion is made the basis of the judgment. See also *Martin* v. *Mackonochie* (4); *Reg.* v. *Bishop of Chichester.* (5)

Carr v. *Marsh* (6) is hardly an authority to the contrary. There the argument was that the Court should not allow the office of the judge to be promoted in the bishop's own Court, the bishop having sanctioned the conduct complained of. Sir John Nicholl there said that to arrive at this conclusion would be to enter on the merits prematurely. [They also cited on this point *Maidman* v. *Malpas.* (7)] It is contended that the terms of the 3rd section of the Church Discipline Act give a discretion to the bishop. Mr. Justice Wightman so held in *Reg.* v. *Bishop of Chichester* (5), and Lord Campbell and Lord Chief Justice Erle, who had ceased to be members of the Court when judgment was given, are stated to have concurred in the conclusion that the rule must be discharged.

Primâ facie the words "it shall be lawful" import a discretion: *In re Newport Bridge.* (8) It is only where the subject-matter imperatively requires it that they can receive a different construction. In *MacDougall* v. *Paterson* (9) the word "may" was held to impose a statutory obligation, but it is obvious that there it was intended to impose an obligation from the nature of the subject-matter. It could never have been intended that a judge should have a discretion, whether he would exercise his judicial power to give costs, when the circumstances exist upon which by the statute the right to costs depends. There is no analogy between such a case as that and the present. It is contended that to give

(1) 1 Moo. P. C. 353.
(2) 3 Hagg. Eccl. 169.
(3) Law Rep. 3 P. C. 245.
(4) Law Rep. 2 A. & E. 116, 123.
(5) 2 E. & E. 209.
(6) 2 Phillim. 198, 204.
(7) 1 Hagg. Consistory, 209.
(8) 2 E. & E. 377.
(9) 11 C. B. 755.

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the bishop a discretion was in conformity with the previously existing state of the law, as shewn by the balance of authority, and that it is desirable that such a discretion should exist. There is no provision for security for costs, and the bishop would be compelled to allow proceedings by any person however unfit as to his means of paying costs or motives. Under the old system a bond was given by the prosecutor. If the contention on the other side is right, the bishop cannot insist on security.

[MANISTY, J. Why not, if the old practice was for a bond to be given?]

Because the statute creates an entirely new procedure. The words apply both to a charge of an ecclesiastical offence and a scandal, as Wightman, J., pointed out in *Reg.* v. *Bishop of Chichester.* (1) It never can have been intended that in the case of a mere scandal it should be obligatory on the bishop to proceed. The words "if he shall think fit" in the second branch of the section merely mean that he is to have a double discretion; first, whether proceedings are to be taken; secondly, whether he shall proceed on the application of the party complaining or ex mero motu. The words may be treated as mere surplusage.

[FIELD, J. Is the parishioner's only remedy for a breach of the law to depend on the discretion of the bishop?]

An indictment will lie for a breach of the Act of Uniformity.

[FIELD, J. But that only includes a small portion of possible ecclesiastical offences.]

2ndly. It is contended that even if the Public Worship Regulation Act has not superseded the Church Discipline Act in regard to the class of offences within its purview, the Court may consider the fact that the later Act requires a representation by three parishioners, and may decline in the exercise of their discretion to assist a complaint made by one parishioner only.

[They also cited Oughton's Ordo Judiciorum, Tit. cl.; *Head* v. *Sanders* (2); *Ex parte Denison* (3); *Denison* v. *Ditcher.* (4)]

Dr. Stephens and *Jeune,* supported the rule. It is not denied that there is a primâ facie case against Mr. Carter on a substantial

(1) 2 E. & E. 209; 29 L. J. (Q.B.) 23.

(2) 4 Moo. P. C. 186.

(3) 4 E. & B. 292; 24 L. J. (Q.B.) 34.

(4) 1 Deane & Sw. Ecc. Rep. 334; 11 Moo. P. C. 324.

charge of ecclesiastical offences. The bishop refuses to proceed, not on the ground that no offence, or a merely frivolous offence has been committed, or that the prosecutor is not a proper person, but on wholly collateral grounds. The question, therefore, is whether the enforcement of the Act of Uniformity is left entirely to the discretion of the bishop. The result would be that a different practice might prevail in different dioceses, and there would be no guarantee for uniformity. If it can be shewn that some sanction of the Court might be required before criminal proceedings were taken in the Ecclesiastical Courts prior to the Church Discipline Act, that sanction, at the most, only related to the question whether the charge was of ecclesiastical cognizance, and as to the security for costs. This appears from the authorities: see *Procurator-General* v. *Stone* (1); *Turner* v. *Meyers* (2); *Carr* v. *Marsh.* (3) If the complaint shewed a sufficient ecclesiastical offence, and the party complaining was a proper person to promote with regard to capacity to pay costs, there was no discretion, and the Church Discipline Act cannot have been intended to create a discretion in the bishop. The words "it shall be lawful" clearly impose a duty on the bishop having regard to the then existing state of the law. The bishop had come in process of time to be entirely separate from his Court, and had no personal jurisdiction whatever. It may be that in criminal cases the leave of the Court had, as a matter of form, to be obtained. The office of the judge was said to be promoted by somebody, and his leave was in form necessary, but it is clear that in theory this was little more than form, and in practice nothing but form. The case of *Maidman* v. *Malpas* (4), seems to shew that this form had in practice come to be omitted. The practice of the law, rather than the theory, is what must be looked to in interpreting the Act. It never could have been intended, having regard to the position of the bishop and the practice, to create a discretion in the bishop of the sort contended for, viz., a discretion to bar proceedings altogether. One of the main objects of the Church Discipline Act was to introduce the commission which is to be selected by the bishop to inquire into the case. The introduction of the application

(1) 1 Hagg. Consistory, 425.
(2) 1 Hagg. Consistory, 415.
(3) 2 Phil. 198, 204.
(4) 1 Hagg. Consistory, 209.

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to the bishop is as a necessary preliminary to the issuing of the commission. The words "if he shall think fit" are conclusive as to the construction of the words "it shall be lawful." They are obviously introduced in the second branch of the section to prevent the words "it shall be lawful" importing an obligation on the bishop to proceed ex mero motu. "Ex mero motu" means that the bishop may himself act as promoter in the suit, and the intention was that the bishop was not to be bound to act as promoter unless he thought fit to do so.

Wightman, J., in *Reg.* v. *Bishop of Chichester* (1), was in error in stating that before the Church Discipline Act proceedings on the ground of scandal were not admissible. Conset and Oughton both speak of scandal as a ground of accusation in a criminal procedure.

The Public Worship Regulation Act, 1874, s. 5, expressly preserves all existing jurisdiction.

Cur. adv. vult.

March 8. The judgment of the Court (Cockburn, C.J., Field and Manisty, JJ.) was delivered by

COCKBURN, C.J. This was an application for a writ of mandamus to the Lord Bishop of Oxford, directing him to issue a commission under 3 & 4 Vict. c. 86, to inquire into the matter of a complaint of Frederick Guilder Julius, Doctor of Medicine, a parishioner of the parish of Clewer, in the county of Berks, and a member of the Church of England, against the Rev. Thomas Thellusson Carter, rector of the said parish, for offences against the laws ecclesiastical in respect of unauthorized deviations from the ritual of the Church in the Communion Service and the use of unauthorized vestments. The complaint was in due form; and looking to the law, as laid down in the decisions of the Judicial Committee of the Privy Council, it must be taken that the instances of alleged departure from the established ritual set forth in the complaint were offences against the ecclesiastical law, and, therefore, within the statute. The bishop has declined, however, to issue the commission as required, assigning as a reason, not

(1) 2 E. & E. 209, 226.

that the matters complained of were not offences against the ecclesiastical law, or were of too unsubstantial and trivial a character to call for inquiry, but resting his refusal on the ground that the repeated failures, which had occurred during the last few years in legal proceedings of this kind, had had a tendency to cover those concerned in them with ridicule and to bring the Church itself into contempt, as well as on the advanced age of the incumbent, the respect and love in which he was held, and the fact that the complaint was made in opposition to the expressed wish of the great majority of the parishioners.

The writ of mandamus being applied for under these circumstances, three questions present themselves—1. Assuming the Church Discipline Act, 3 & 4 Vict. c. 86, the statute upon which this application is founded, to be still in force in such a case, is it obligatory on the bishop, as matter of statutory duty, to issue a commission as prayed for, with the alternative of sending the cause to the Court of Arches in the first instance; or is it in his discretion to refuse to institute any further proceeding? 2. Is the Act in question still in force, or has it been superseded by the Public Worship Regulation Act of 1874? 3. If the Church Discipline Act is still in force and applicable to the present case, and the exercise of the power conferred by the statute is obligatory on the bishop, is the case one in which this Court should exercise the discretion which it possesses in the matter of mandamus and refuse the writ? With a view to these questions, it becomes necessary in the first place carefully to consider the Church Discipline Act under which this application is made, not only with reference to the third section, on which the application is immediately founded, but also with reference to the general scope and purpose of the statute.

The 3 & 4 Vict. c. 86, superseding the former modes of proceeding against clerks in orders, enacts in s. 3, that "in every case of any clerk in holy orders of the United Church of England and Ireland who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of

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any party complaining thereof, or if he shall think fit of his own mere motion, to issue a commission under his hand and seal to five persons, of whom one shall be his vicar-general or an archdeacon or rural dean within the diocese, for the purpose of making inquiry as to the grounds of such charge or report." The commissioners so appointed are to examine witnesses on oath for the purpose of "ascertaining whether there be sufficient primâ facie ground for instituting further proceedings." Having taken the evidence, they are to transmit the depositions of the witnesses to the bishop, and to report to him whether in the opinion of the majority there is sufficient primâ facie ground for further proceeding. If the commissioners report that there is sufficient primâ facie ground for further proceeding, and if the bishop or the party complaining shall thereupon think fit to proceed against the party accused, articles are to be drawn up, which, with the depositions, are to be filed in the registry of the diocese. The bishop is then to cite the party accused to appear to make answer to the articles. If he appears and admits the truth of the articles, the bishop or his commissary specially appointed for the purpose is to pronounce sentence according to ecclesiastical law. If the party fails to appear, or, appearing, makes any other answer than an unqualified admission of the truth of the articles, the bishop is to proceed to hear the cause with the assistance of three assessors specially qualified by the Act; and, having heard the cause, is to determine the same and pronounce sentence thereupon according to the ecclesiastical law. There is, however, a special provision that before issuing the commission, or after the report of the commissioners, provided it be before the filing of the articles, "it shall be lawful for the bishop, if he shall think fit," to send the case by letters of request to the Court of Appeal of the province, there to be heard and determined.

Such being the method of proceeding provided by this statute, the first question which presents itself is whether the enactment in the 3rd section, which says that on a complaint against a clerk in orders of an offence against the ecclesiastical law, "it shall be lawful" for the bishop to issue a commission of inquiry, simply confers a power to be exercised at discretion, or imposes a duty which requires the exercise of the power in the circumstances

contemplated by the statute. It is said that the question is settled by authority, there having been a decision of this Court in the case of *Reg.* v. *Bishop of Chichester* (1), to the effect that the Act simply confers a power to be exercised at discretion. But, when that case comes to be looked at, it appears extremely doubtful whether such was the ground of the decision of the majority of the Court. The argument on the rule having been heard before Lord Campbell, Mr. Justice Wightman, Mr. Justice Erle, and Mr. Justice Hill, before judgment was delivered, Lord Campbell had become Lord Chancellor, and Mr. Justice Erle had become Chief Justice of the Common Pleas; for which reason the only judgments delivered were those of Mr. Justice Wightman and Mr. Justice Hill, who, while they concurred in discharging the rule for a mandamus, proceeded on different grounds, Mr. Justice Wightman no doubt expressly holding that the bishop had a discretionary authority which could not be controlled by mandamus, while Mr. Justice Hill, declining to act on this view, concurred in discharging the rule solely on the ground that, the applicant not being a parishioner, and therefore not interested in the performance of the service in the church in question, the case was not one in which the Court, having a discretionary authority in the matter of mandamus, ought to issue the writ. It is true that Mr. Justice Wightman at the close of his judgment adds that Lord Campbell and Lord Chief Justice Erle concurred in thinking that the rule should be discharged; but he does not say on which of the two grounds they so concurred, which makes it, to say the least, extremely doubtful whether it was in concurrence with his own view: for there being a difference of opinion between himself and Mr. Justice Hill, had his own view been borne out by the opinion of the other two judges, or either of them, it may reasonably be inferred that he would have said so. It also appears from the statement of Dr. Stephens, derived from his own recollection of what occurred in the case of *Shepherd* v. *Bennett* (2), before the Judicial Committee of the Privy Council, and which is fully borne out by the shorthand notes, that in the latter case Sir William Erle disclaimed having acted on the ground taken by Mr. Justice Wightman. To which we may add that we have

(1) 2 E. & E. 209. (2) Law Rep. 4 P. C. 351.

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recently been informed by Sir William Erle that he did not authorize Mr. Justice Wightman to say more on his behalf than that he concurred in discharging the rule for a mandamus. It is true that in the *Newport Bridge Case* (1), which occurred in the same year, Mr. Justiee Crompton expresses his concurrence in the view taken in the previous case by Mr. Justice Wightman; but it is to be observed that Mr. Justice Crompton had not been a party to the judgment in that case, or to the discussion which had been held upon it. The same question came again before this Court, in the case of Mr. Bennett, on an application for a mandamus to the Bishop of London, a report of which case has been published, and from which it no doubt appears that a strong intimation was thrown out, in the course of the argument, as well as in giving judgment, by Mr. Justice Lush, of concurrence in the view taken by Mr. Justice Wightman in the Bishop of Chichester's case—founded mainly, however, on what we cannot but believe to have been a mistake—namely, that Lord Campbell and Lord Chief Justice Erle had concurred in discharging the rule in that case on the ground taken by Mr. Justice Wightman. It became, however, unnecessary to decide as to the construction of the statute in Mr. Bennett's case; and Mr. Justice Lush and the other judges expressly disclaim all intention of doing so; inasmuch as, there being already a proceeding pending against Mr. Bennett, under a commission issued by the bishop in respect of similar doctrines contained in a former publication, the Court thought the mandamus unnecessary and uncalled for, and therefore, in the exercise of its discretion, refused to grant the writ. In this state of uncertainty we feel ourselves at liberty to form our own judgment as to the construction to be put on the enactment in question; the more so as, for reasons which will be explained further on, the ground on which the opinion of Mr. Justice Wightman was founded appears to us open to very serious question.

The question turns on the true sense of the term "it shall be lawful" (as used in the 3rd section of the Church Discipline Act)—a term frequently used in statutory language—perhaps, considering its ambiguity, too frequently, as it is one which admits of no less than three different meanings, in all of which it occurs in this very

(1) 2 E. & E. 377.

statute. (1) It may be used to confer a right or privilege for the benefit of the party to whom it is given, to be exercised or not at his option; (2) it may be used to confer a power or authority, to be exercised for the benefit of others but at the discretion of the party on whom it is conferred; or (3), while it confers a power or authority, it may, at the same time, impose the duty of exercising the power or authority so conferred. Besides which the general sense of these words is sometimes restricted by some qualifying expression, such as "if he shall think fit," "if it shall appear to him right," or the like, indicating that the exercise of the power is to be subject to the discretion of him who is authorized to exercise it. In the absence of any such qualifying expression, the meaning of the words must be sought in the context of the particular enactment, or in the other sections of the statute, or by reference to its general purpose, and the alteration in the existing law which it was intended to effect, as also in certain canons of construction applicable to this and similar expressions in statutes of a particular class. In the statute before us the term "it shall be lawful" occurs in the several meanings in which it can thus be used, in two of them more than once. It is used to confer a right or privilege, to be exercised at the option of the party, in the 4th section, which provides that "it shall be lawful for the party accused, or his agent, to attend the proceedings of the commission and to examine any of the witnesses;" and again in the 15th section, which provides that "it shall be lawful for any party who shall think himself aggrieved by a judgment pronounced by the bishop, or in the Court of Appeal of the province, to appeal from such judgment." It is used in the sense of conferring a discretionary power or authority in the 6th section of the Act, where it is said that where proceedings have been commenced under the Act, "it shall be lawful" for the bishop, the written consent of the clerk accused and of the party complaining having been first obtained, to pronounce sentence without further proceedings. Three instances occur in which the words are used as imposing a duty. Thus, when in s. 4 it is said that "it shall be lawful for the commissioners to examine on oath or solemn affirmation, and that such oath or affirmation shall be administered by them to all witnesses who may be tendered to them, either in

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support of the charge or by the party accused, as well as to all witnesses whom they may deem it necessary to summon, for the purpose of fully prosecuting the inquiry," there can be no doubt that the duty of so examining the witnesses is thereby imposed; and the same observation applies to the use of the same words in s. 17, which has reference to the evidence of witnesses and documents in every stage of the inquiry. Equally clear is it that when by s. 9 it is provided that, when the commissioners shall have reported that there is sufficient primâ facie ground for instituting proceedings, "it shall be lawful for the bishop, by writing under his hand, to require the party to appear, by himself or his agent, to make answer to the articles," a judicial duty is cast upon the bishop which he has no alternative but to discharge. Three instances occur in which the effect of these words is restricted by qualifying expressions. Thus, s. 13 provides that "if it shall appear to the bishop that great scandal is likely to arise from the party accused continuing to perform the services of the Church, or that his ministration will be useless, while the charge is pending, it shall be lawful for the bishop to inhibit the clerk from performing any service till the sentence shall have been given." It is obvious that the exercise of the power here given must depend on the view taken by the bishop. So when, in s. 13, it is provided that "it shall be lawful" for the bishop, "if he shall think fit," at any time before articles are filed, instead of hearing and deciding the cause under s. 11, "to send the case by letters of request to the Court of Appeal of the province, to be there heard and determined according to the law and practice of that Court," it is plain that this is a discretionary power. It may be material to observe in passing that these instances shew that the framers of this Act were sensible of the necessity, where the authority conferred was intended to be discretionary, of appending words of limitation to the phrase in question. Of this a still more striking instance is to be found in the very section which we are called upon to construe, which, after providing that "it shall be lawful for the bishop to issue a commission on the application of any party complaining," proceeds to add, "or, if he shall think fit, of his own mere motion." Here the words "if he shall think fit" would appear to have been introduced for the purpose of preventing

the preceding words, "it shall be lawful," from precluding the exercise of the discretionary power which in the alternative case it was intended to confer on the bishop.

We have next to consider the rules of construction to be applied in determining the sense in which the words "it shall be lawful," in the 3rd section of the Church Discipline Act, are to be taken. In doing this we start with an established canon of construction, namely, that in statutes of a certain class, of which the statute under consideration is one, these words have acquired a settled meaning, unless controlled by the context of the particular enactment, or by the sense in which they are used in other parts of the statute, or by what, on the purview of the statute, is its apparent purpose; as to the latter of which, the prior state of the law, and the end which the statute was intended to effect, may no doubt have to be considered. Whether or not these words are to be considered as simply conferring a discretionary power, or as imposing the duty of exercising the power conferred, when its exercise is called for, must depend in the first place on the subject-matter of the statutory enactment. It may be assumed that, in the ordinary run of statutes, these words import, generally speaking, a faculty or power to be exercised at the option or discretion of those on whom it is conferred; and such, it seems, is to be taken to be their primâ facie meaning where the subject-matter will admit of it, or where the exercise of the power may depend on contingencies on which a judgment has first to be formed. Thus, in the case *In re Newport Bridge* (1), which was an application for a mandamus under 43 Geo. 3, c. 59, s. 2, which, with reference to county bridges, enacted that where any such bridge was narrow and incommodious it should be lawful for the justices of quarter sessions to order the same to be widened and improved, Mr. Justice Crompton, after saying that "the meaning to be attributed to the phrase 'it shall be lawful' in a statute must depend on the subject-matter in every instance," goes on to say: "Primâ facie those words import a discretion, and they must be construed as discretionary unless there be anything in the subject-matter to which they are applied, or in any other part of the statute, to shew that they are meant to be imperative." "In the present statute,"

(1) 2 E. & E. 377.

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he says, "not only does it not appear that the Act was intended to be compulsory upon the justices, but it appears from the subject-matter that it was intended to be left to their discretion. It seems to me that the legislature must have so intended when I consider the nature of the Court which has to decide whether the act shall be done, and the many questions of expense and expediency which may arise before the act can be prudently determined on." Mr. Justice Hill dwells more fully on the circumstances to be thus taken into consideration. Mr. Justice Blackburn says, "The words 'shall and may be lawful,' are to be taken in their primary sense as permissive, and not compulsory, unless there be any thing in the subject-matter of the enactment requiring that they shall receive a different construction. For a time I thought that the present enactment did require that the imperative construction should prevail, and that the object of the legislature was that upon the one fact appearing that the bridge was narrow and incommodious, it should be widened as a matter of course. I now, however, agree in what has fallen from my Brother Hill—that the justices have other matters, such as he has pointed out, to take into consideration, besides the narrowness of the bridge, before they decide whether or not to order it to be widened. That being the case, it is quite clear that the legislature must have intended to leave them the discretion which the language of the statute primâ facie imports."

But though the rule thus laid down may hold good in the general run of statutes, in those of the class to which the Church Discipline Act belongs a different rule has prevailed for a very great length of time, and is now fully established. So long ago as the year 1693 it was decided in the case of *The King* v. *Barlow* (1), that when a statute authorizes the doing a thing for the sake of justice or the public good, the word "may" means "shall;" and that rule has been acted upon to the present time. In Bacon's Abridgment title Statute (I.), the rule is so laid down, as also in Dwarris on Statutes, p. 264. Speaking of facultative words, it is there stated that where a statute directs the doing of a thing "for the sake of justice" or "for the public benefit," the word "may" shall be construed as "shall" or "must;" and, of course, the same

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(1) Salk. 609.

rule will apply to the words "it shall be lawful." Such a construction was put on these words by the Court of Common Pleas in the case of *MacDougall* v. *Paterson* (1), in which it was held that the word "may" in the County Courts Extension Act (13 & 14 Vict. c. 61), which provides that in certain cases the Court, or a judge at chambers, may by rule or order direct that the plaintiff shall recover his costs, is not used to give a discretion but to confer a power, and that the exercise of such power depends not upon the discretion of a Court or judge, but upon the proof of the particular case out of which such power arises. In that case Lord Chief Justice Jervis says: "When a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application." "For these reasons," continues the Chief Justice, "we are of opinion that the word 'may' is not used to give a discretion, but to confer a power upon the Court and judges; and that the exercise of such power depends, not upon the discretion of the Court or judge, but upon the proof of the particular case out of which such power arises." A similar construction was put on the words "it shall be lawful" in the case of *Morisse* v. *Royal British Bank* (2), in which it was held that these words, in the 13th section of 7 & 8 Vict. c. 113, the Joint Stock Bank Act, were compulsory, and left no discretion to the Court or judge. The case of *Crake* v. *Powell* (3) is to the same effect. But it is unnecessary to multiply cases in support of this position. "It has been so often decided," says Mr. Justice Coleridge, in the case of *R.* v. *Tithe Commissioners* (4), "as to have become an axiom, that in public statutes words only directory, permissory, or enabling may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice." It may, however, be satisfactory to observe that the same sense has been ascribed to these words in the Courts of the United States. In the case of *The Supervisors* v. *United States* (5), Mr. Justice Swayne, in delivering the judgment of the

(1) 11 C. B. 755.
(2) 1 C. B. (N.S.) 67.
(3) 2 E. & B. 210.
(4) 14 Q. B. 474.
(5) 4 Wall. Rep. 435, 446.

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Supreme Court, after referring to the English and American cases, says as follows: "The conclusion to be deduced from the authorities is that where power is given to public officers, in the language of the Act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is, in fact, peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless." Now, the statute we are considering unites both the properties which have been referred to. It has reference to the administration of justice in the matter of ecclesiastical offences; and, as it relates to the maintenance of the doctrine and ritual of the established religion, for upholding the uniformity of which so many Acts of Parliament have been passed, it cannot be held to be other than matter of national interest and concern. Moreover, it is the undoubted right of every inhabitant of every parish in the kingdom, desirous of frequenting the parish church, to have the services of the Church performed according to the ritual of the Church, as established by law, without having his religious sense shocked and outraged by the introduction of innovations not sanctioned by law or usage, and which may appear to him to be inconsistent with the simplicity of the Protestant worship, and to pertain to a religion which he believes to be erroneous, and the ritual of which is not that of the Church of England. It cannot admit of doubt that a statute, by means of which a right so important to the general sense of mankind was alone to be capable of being enforced and upheld—since it abolished the previous jurisdiction of the Ecclesiastical Courts in the matter of clerks in orders—is one of general interest and concern, in the construction of which the rule referred to would be applicable.

This being so, we have next to see whether we find anything in the language or purpose of the statute which shews that the words were intended to have a less authoritative meaning. So far from this being the case, as regards the language of the

3rd section, we find, as has already been pointed out, that between that part of it which relates to the power of the bishop to issue a commission on a complaint addressed to him, and which enacts that it shall be lawful for him so to do, and that part which enables him to do so of his own mere motion, independently of any complaint, the words "if he shall think fit" are interposed. It is here obvious that if the words "it shall be lawful" had been intended to confer a discretionary power, as these words would, in the absence of the words "if he shall think fit," have governed and controlled the whole sentence, the latter words would have been wholly superfluous. They can only have been introduced, therefore, for the purpose of qualifying the previous expression. Taken as a whole, it therefore seems to us from the collocation of the words that the passage affords the key to its own interpretation, and indicates the sense in which the words in question are to be taken. It was suggested on the part of the bishop that the words "if he shall think fit" in s. 3 should be rejected as superfluous. To this we answer that in so doing we should violate a settled canon of construction, namely, that a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. (Bac. Abr; tit. Statute I. sub-s. 2.) But this is not all. The words are significant, as indicating the sense in which the words "it shall be lawful" in the preceding part of the section had been used by the framers of the Act. They would in any point of view have been idle, if not introduced to qualify the effect of the words "it shall be lawful" as imposing a duty. Mr. Justice Wightman, it is true, in *Reg.* v. *Bishop of Chichester* (1) arrived at the opposite conclusion, derived from the enactments of the section in question. His opinion was founded on the ground that the power to issue a commission in the 3rd section applied as much to a case of "scandal or evil report of having offended against the ecclesiastical law," as to one of an offence charged to have been actually committed; and he argues, ab inconvenienti, that it cannot have been the intention of the legislature to put it in the power of a prosecutor to call upon a bishop to issue a commission, and so to initiate proceedings on what may turn out to

(1) 2 E. & E. 209.

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be unfounded rumours; the more so as, according to the learned judge, as the law before stood, "the office of the judge could only have been promoted in the case of some direct and positive charge of an offence against the laws ecclesiastical, and no proceeding upon the ground of scandal or evil report of having offended against these laws would have been admissible." But, in the latter assumption, the learned judge was, we cannot but think, in error. Public report or scandal was a ground of accusation in the ecclesiastical procedure, whether the proceeding was by inquisition, that is when the proceeding was instituted by a bishop or an archdeacon, ex officio mero; or was founded on presentment by churchwardens, or on the complaint of a party promoting the office of the judge. In the proceeding by inquisition the articles, Oughton tells us (Ordo Judic. tit. 141, s. 1), were to contain, "Tam causas conventionis (i.e. in jus vocationis) quam famam publicam." Again, he says (Ibid. n. f. 22) "Etsi reus non tenetur respondere positioni criminosæ, tenetur tamen respondere positioni continenti famam publicam criminis articulati. Igitur in his articulis fama publica objecti criminis est alleganda et objicienda." Nay, so material was public scandal or evil report deemed to be as founding a charge against a party, that the judge was bound to summon and examine the fellow-parishioners of the accused as to its existence. "Si reus negaverit crimen objectum et famam," says Oughton (Ordo Judic. tit. 145, s. 1), "tunc, si crimen objectum fuerit notorium et publicum, ac de eodem publica vox et fama, judex producere et examinare curabit parochianos rei, vel alios quoscunque, ad famam probandam, eosque ad perhibendum testimonium, si rogati recusaverint, per censuras ecclesiasticas compellere." Even though the proof of the alleged offence failed, if the evil report was established the accused might be sentenced to clear himself by purgation, that is, by producing a certain number of compurgators, who were to swear they believed the report to be unfounded. "Si fama confessata vel probata fuerit," says Oughton (Tit. 144, s. 7), "judex potest purgationem indicere." If the accused failed in his purgation, he might be enjoined to do public penance (Ib. 147, s. 2). The same thing occurred on presentments by churchwardens (see tit. 152) termed by the civilians Denunciatio. Here, again, as appears from Conset,

Oughton, and the 115th canon, public scandal and report became part of the inquiry, it being, according to the old law, part of the duty of the churchwardens to present those against whom, whether minister or parishioners, such scandal or report prevailed. Nor was this confined to the proceedings by inquisition or by presentment. On an accusation by a party promoting the office of the judge, the articles in like manner alleged the publica fama of the imputed offence; and here, again, it is laid down (Oughton, tit. 150, ss. 7 and 8): "Si actor probaverit famam publicam, vel præsumptiones vehementes, ob quas purgatio parti reæ indicta fuerit, vel indici possit et debuisset, quamvis non probaverit crimen objectum, tamen obtinebit sententiam purgationem esse indicendam, et reus est in expensis illius litis condemnandus. Nam reus, negando famam, causavit actorem litigare, et expensas facere circa probationem ejusdem." It thus appears that public scandal or report did play an important part in penal suits in the Ecclesiastical Courts, and was of itself sufficient to place the party against whom it was brought forward under the necessity of clearing himself by oath; and it is, we think, going too far to say that if a strong case of public scandal had been brought before the judge as the ground for allowing the office of the judge to be promoted, the application would have been refused. We think it not unlikely that the intention being, as presently will be more fully shewn, to leave the substantive law as it stood, changing only the method of proceeding, these words were introduced as applicable to the cases in which public report might have formed matter of judicial inquiry. At all events, we think the argument well founded that in the passage in question the words "if he shall think fit," give the key to the words "it shall be lawful" in the earlier branch of the sentence; and that the inference arising from the collocation of the words is far stronger than any which can be drawn from the supposed intention of the legislature, which, after all, can only be matter of surmise. The language of the section, though it might have been more explicit, is, we think, too clear to warrant us in speculating on the legislative intention. It is, moreover, obvious that if it had been the intention of the legislature that the issuing of a commission should be at the discretion of the bishop, nothing would have been easier than to

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say so, as has been done in the Public Worship Act. By placing the words "if he shall think fit" in an earlier part of the sentence, immediately after the words "it shall be lawful," all ambiguity would have been removed.

We next proceed to consider the purpose of the statute as a whole. On the purview of it, especially when looked at by the light of the report of the Ecclesiastical Courts Commissioners, which preceded it, and of the preamble, which is confined to the recital that "the manner of proceeding in causes for the correction of clerks requires amendment," it appears plain that the statute has reference, not to the substantive law, but simply to the procedure applicable to a suit against a clerk in orders for an ecclesiastical offence. It leaves the law as to what shall constitute an offence under that law just as it stood before. It nowhere professes to abridge or interfere with any existing right of instituting proceedings against a clerk in orders for an ecclesiastical offence. It is the method of proceeding alone with which the statute deals. Thus, by the effect of the 23rd section, it takes from the bishop the power of instituting proceedings by way of inquisition, as was held in the *Dean of York's Case* (1), and makes it necessary for the bishop, if he desires to prosecute ex mero officio, either to issue a commission under s. 3, if he desires to prosecute the suit in his own court, or to send the cause in the first instance to the metropolitan court by letters of request under s. 13. And whereas, in a penal suit instituted by a party promoting the office of the judge, leave to promote the office must first have been applied for and obtained in the court of the bishop, and, leave to promote the office of the judge having been obtained, articles would have been at once exhibited and the suit proceeded with—a matter generally involving much expense, and sometimes the vexatious harassment of the defendant—the statute, on an accusation of an ecclesiastical offence being brought forward, requires a complaint to be addressed to the bishop himself, and, except in the case just put, where the bishop thinks proper to exercise the power vested in him by the 13th section, and dispensing with any preliminary inquiry, sends the cause at once by letters of request to the court of the province, interposes, before the suit can be further prosecuted, a preliminary

(1) 2 Q. B. 1.

inquiry as to the facts by means of a commission, on whose report whether a primâ facie case for further proceedings has been made out it depends whether the suit shall proceed—an institution analogous to the finding of a grand jury on a bill of indictment. In other respects, when the commissioners have reported that there is primâ facie ground for further proceedings, the jurisdiction of the bishop remains very much as it was before, except that he may have to exercise the functions of a judge himself, instead of the cause being tried before his appointed judge. If the party admits the truth of the articles, the bishop, or his commissary appointed for the purpose, may at once pronounce sentence. If the facts are denied, the bishop can either try the cause himself, with the assistance of three assessors specially qualified under the Act, and himself determine it—this mode of trial being substituted for the trial in the diocesan court by the bishop's judge—or, the bishop may, as he might have done before on a suit being instituted in his own court, send the suit by letters of request to the metropolitan court. In all this there is manifestly nothing which affects the right to institute proceedings, though the mode of initiating the suit is changed, and the party desirous of prosecuting a clerk in orders for an ecclesiastical offence, instead of obtaining leave to promote the office of the judge, must now prefer a complaint to the bishop, and, unless the bishop thinks proper to send the case at once to the provincial court, must abide by the report of a commission as to whether the suit shall be proceeded with. But, subject to this, the statute does not profess to deal with the right to prefer a charge against a clerk in orders, if the offence charged amounts to an offence against the ecclesiastical law; and it therefore becomes material to consider how the law stood in respect of the right of instituting proceedings against a clerk in orders prior to the passing of the statute.

Two conflicting views have been pressed upon us: the one that though, in order to promote the office of the judge, it was necessary to obtain leave of the Court, yet that this was, practically speaking, merely matter of form, and that the leave could be claimed as of right, provided the offence proposed to be prosecuted was one of ecclesiastical cognizance, and the promoter was of ability to pay costs if defeated in the suit. On the other

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hand, it was contended that to allow the office of the judge to be promoted was not matter of form, but one on which the judgment of the judge had to be exercised; from which it was argued that, in the present statute, it must have been intended to leave a like discretion to the bishop. In support of the first proposition, the old authorities, Conset and Oughton, are cited. Thus, Conset (Practice, part vii. c. 2) says: "If any hath committed any crime (whereof the spiritual courts have cognizance) and is not detected, denounced, or presented for the same, or if the bishop or archdeacon have not proceeded against him by way of inquisition, yet any person (who offers himself ready to pay the party to be convened his charges, if he doth not prove the matters objected) hath interest voluntarily to implore and promote the office of the judge, and may call the delinquent to answer articles, and may adminster articles to him when he appears, in the name of the judge, and of his office promoted, and may accuse the delinquent." So Oughton, following Conset, says (Ordo Judiciorum, tit. 150):—"(1) Si quis crimen, ad fori ecclesiastici cognitionem spectans, commiserit, et de eodem non fuerit detectus, denunciatus vel præsentatus, vel episcopus, vel archidiaconus non processerit contra eum per inquisitionem; quælibet tamen persona (si fuerit solvendo expensas parti conveniendæ, si objecta non probaverit) habet interesse (quoniam reipublicæ interest ut delicta puniantur) et judicis officium implorare, et voluntarie promovere; et delinquentem, ad respondendum articulis, ex officio judicis promoto ministratis, in jus vocare potest, et parti comparenti articulos (nomine judicis, et ex ejus officio promoto) objicere, et ministrare, et delinquentem accusare." That this principle continued to be acted on appears from several dicta of ecclesiastical judges. In *Argar* v. *Holdsworth* (1), Sir George Lee says, "A clergyman may be prosecuted by any one for neglect of his clerical duty." In the case of *The Procurator-General* v. *Stone* (2), Sir William Scott says, "This is a prosecution originating in a citation in the name of the Bishop of London, though the bishop might be personally ignorant of the existence of such suit. It is the constant style of the Court; and it is not in the power of the bishop by any intervention on his part to

(1) 2 Phill. Cases temp. Lee, 515. (2) 1 Consistory, 425.

refuse the process of the Court to any one desirous to avail himself of it in a proper manner." In *Turner* v. *Meyers* (1), the same learned judge had said, "The criminal suit is open to every one; the civil suit to any one shewing an interest." These dicta were, however, only incidentally made, and were not necessary to the decision of the cases in which they were pronounced. What was said by Sir John Nicholl in *Carr* v. *Marsh* (2) is more directly to the point. The suit being in pœnam, in which the office of the judge was promoted, against a clergyman, for officiating in a chapel licensed by the bishop, but without the consent of the incumbent of the parish, it was urged that, the defendant having acted with the sanction and approval of the bishop, the promoter ought not to be allowed to promote the office of the judge against him in the bishop's own court. Sir John Nicholl, however, says, "It is said that there is a discretion in this case, and that the Court should not allow the office of the judge to be promoted in such a cause. But the cause must be tried before we arrive at this conclusion, otherwise we enter on the merits prematurely. Application is always made to the judge before a citation issues in a cause in which the office is promoted; but that is not for the purpose of considering the merits of the case, but from the nature of the suit, whether it be of ecclesiastical conusance or the fitness of the person to be made responsible for costs to the other party."

Dicta of an opposite tendency were brought forward on the other side. Thus, in *Maidman* v. *Malpas* (3), Sir William Scott, speaking of a suit in which the office of the judge is promoted, says, "The leave of the Court should be first obtained, since it is a part of the ecclesiastical jurisdiction which is not to be exercised without discretion or to be left entirely to the judgment or passions of private persons." In *Lee* v. *Matthews* (4), which was a case of brawling in a vestry, Sir John Nicholl certainly uses language which tends to shew that it is in the discretion of the judge in certain cases to allow his office to be promoted or not as he may think right. "This being," he says, "a case of office, the whole transaction should have been fairly and candidly stated at once in order that the judge might have an opportunity of

(1) 1 Consistory, 415.
(2) 2 Phill. R. 204.
(3) 1 Consistory, 209.
(4) 3 Hagg. Eccl. R. 169.

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considering whether both parties being involved in pari delicto he ought to allow his office to be promoted." "Had all the facts appeared in the articles," he continues, "I doubt whether, considering that the promoter is not a disinterested officer of the parish proceeding in his official capacity, ob publicam vindictam, but a private individual proceeding for an offence committed against himself, I should have allowed the case to have gone on." It is, however, here to be observed that this by no means shews that if the suit had been promoted by a proper party, and ob publicam vindictam, the office of the judge could have been properly withheld. The language of the same learned judge in *Carr* v. *Marsh* (1) would lead us to think that under such circumstances the permission to promote the office of the judge would have been granted as of course. In *Sherwood* v. *Ray* (2), in a civil suit instituted by a father to annul the marriage of his daughter as incestuous, and which came before the Judicial Committee on appeal, the objection having been urged that the father had no civil interest to enable him to maintain the suit, Baron Parke, in delivering the judgment of the Court, of which Sir John Nicholl had been a member, as a ground for holding that the possibility of having to support the offspring, if legitimate, under 43 Eliz. c. 2, was a sufficient interest to entitle him to sue, observes that "this may be the only form in which any individual can question the marriage as matter of right." "For," adds the learned judge, "to promote the office of judge in a criminal suit requires the authority and consent of the Court; and though this is obtained without difficulty in ordinary practice, it cannot be demanded ex debito justitiæ." But it is here to be observed that this was not the point to be determined in the cause, nor had it been adverted to in the argument, but appears to have been resorted to by the Court as a technical, certainly not being a substantial, ground for holding that the very remote possibility of having to maintain the issue, if legitimate, furnished a sufficient interest to sue to annul the marriage. And though, technically speaking, it might be true that the office of the judge could not be claimed as of right, ex debito justitiæ, no one can doubt that it would have been allowed as of course to a father seeking to set

(1) 2 Phillim. 204. (2) 1 Moo. P. C. 353.

aside the incestuous marriage of his daughter. Moreover, one is at a loss to see how the absence of a right to sue criminally could be any reason for holding that the party had a civil interest entitling him to sue. Lastly, in *Elphinstone* v. *Purchas* (1), also a case before the Judicial Committee, it is said by Sir Robert Phillimore, in delivering the judgment of the Court,—"It was decided by their lordships in the case of *Sherwood* v. *Ray* (2), which was one of great importance, and very carefully considered by the eminent judges who sat upon it, among whom was Sir John Nicholl,—perfectly acquainted with the practice of the Ecclesiastical Courts,—that the promotion of the office of the judge, though generally permitted as a matter of course, cannot be demanded ex debito justitiæ." There is here, we cannot help thinking, some mistake. As has been observed, the point was not decided in *Sherwood* v. *Ray* (2); it was only thrown in by way of argument. But the language of Sir Robert Phillimore shews that he—himself an eminent authority—and the other members of the Judicial Committee who sat in *Elphinstone* v. *Purchas* (3) took the same view of the question as had been incidentally expressed in the former case.

Looking to these authorities, it appears to us that neither of the conflicting propositions thus put forward is tenable to the full extent to which it has been urged. The result of the authorities as to the former law appears clearly to be that although, as may be gathered from *Maidman* v. *Malpas* (4) and other cases, it was necessary for a party desirous of proceeding in a penal suit in an Ecclesiastical Court to obtain leave to promote the office of the judge, yet if the charge involved an offence against the ecclesiastical law, and there was no reason for doubting the bona fides of the complaint, and the complainant was a proper person to institute the suit and of ability to pay costs if he failed in it, the leave was never withheld, but, on the contrary, was always granted as a matter of course—we had almost said of right—without any precognition of the case as to its intrinsic merits, or reference to the position of the accuser, whether parishioner or otherwise, beyond his fitness to carry on the suit. Theoretically it may be correct

(1) Law Rep. 3 P. C. 245, 254.
(2) 1 Moo. P. C. 353.
(3) Law Rep. 3 P. C. 254.
(4) 1 Consistory, 209.

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to say that leave to promote the office of the judge could not be claimed ex debito justitiæ, and that if it had been refused the party would have been without redress—at all events, so far as the remedy by mandamus was concerned. But it is, nevertheless, plain that to refuse it, except in very special cases, would have been a denial of justice, to which we may presume that no ecclesiastical judge would have been a party. This being so, we do not feel warranted in assuming, in the absence of positive enactment, that, in transferring the jurisdiction of the Ecclesiastical Court to the bishop, the legislature can have intended to place a party desirous of prosecuting a clerical offence in a less advantageous position than he would have been in before the statute. We find nothing in the provisions of the statute which has, or, so far as appears, can have been intended to have, the effect of taking away the ability to institute a suit against a clerk in orders where it existed previously, all that the statute does being to alter the mode of proceeding. Instead of obtaining leave to promote the office of the judge from the bishop's court, the prosecutor must now apply directly to the bishop, who, under the terms of the 3rd section, would have to see, as the judge had before, that the complaint involved an offence of ecclesiastical cognizance, it being to such only that the enactment applies. But with this limitation we see nothing that alters or affects the right of a party desiring to prosecute, or which debars him from calling upon the bishop, thus substituted for the judge, to set the law in motion by either issuing a commission under the 3rd section, or at once sending the complainant to the court of the province under the 13th section. It is difficult to suppose that if the intention of the legislature had been so to modify the right of a party desirous to prosecute as to make it contingent on the will of the bishop, it would not have said so in clear and unambiguous terms. Of course nothing would have been easier than to do this. The mere transposition of the words "if he shall think fit" in the 3rd section so as to make them govern the whole, instead of prefixing them to the action of the bishop ex proprio motu, would obviously, as has already been pointed out, have had that effect, whereas their present collocation leads strongly to the opposite conclusion.

But we are invited to follow the history and origin of this

legislation in order the better to apprehend the meaning and intention of the enactment in question. It is true that the Ecclesiastical Courts Commissioners, in their report of 1832, having pointed out the evil of the great delay and expense attendant on the prosecution of penal suits in the Ecclesiastical Courts, and which had been strikingly exemplified in certain recent suits which had caused considerable scandal, recommended that the proceedings in the prosecution of offences against clerks in orders should be transferred to the bishop. But they further proposed as part of their scheme, as a protection against vexatious suits, that there should be a preliminary inquiry on oath before the bishop, with a view to his allowing or disallowing the suit to proceed, with, in case of his disallowing it, an appeal to the archbishop. The first part of this recommendation was adopted, but not the remainder. It was not till some years afterwards that—in 1840—the Government carried through parliament the Church Discipline Act, in which, for the preliminary hearing before the bishop recommended by the commissioners, was substituted the commission to be appointed under s. 3, by whose report the bishop, except where he chose at once to institute proceedings by letters of request, was to be guided as to allowing the suit to proceed. We see nothing in the circumstances under which this statute was passed to lead us to think that it was intended to do more than to afford the accused clerk the protection of the preliminary inquiry by the commission. For the discretion proposed by the report of the Ecclesiastical Commissioners to be given to the bishop—to be exercised, it must be remembered, after inquiry on oath—was substituted the inquiry by the commission, upon whose decision the further prosecution of the suit was to depend. It is also, perhaps, not altogether beside the question to observe that the suits to which the commissioners were referring were for the most part suits against clergymen for immorality. The movement in the Church with respect to doctrine and ritual of a Roman Catholic tendency had not then as yet arisen, and it may well be doubted whether, if that movement could have been foreseen, the legislature would have placed any additional restraint on the right of parishioners to bring innovations of such a nature to the test of legal decision. Far, therefore, from affording any proof of the

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intention of the legislature to give an absolute and unfettered discretion to the bishop, the prior state of the law and the origin of the statute have rather a contrary tendency.

But, instead of speculating on the legislative intention by reference to extraneous circumstances, we think it safer to found our view on the internal evidence afforded by the statute itself. Now, finding nothing in the enactments or language of the 3rd section or other parts of the Church Discipline Act which should have the effect of controlling or qualifying the words "it shall be lawful," but, on the contrary, finding the language of the section pointing, as it seems to us, the contrary way, we can see no ground which would justify us in giving to these words any other than the meaning which the established canon of construction has assigned to them—a canon of construction so thoroughly settled that Mr. Justice Coleridge speaks of it as an axiom—and by which in construing this statute we deem ourselves absolutely bound. With this rule before us, we do not deem ourselves called upon to enter into the subject of the inconveniences, on which the Lord Bishop dwelt in his argument, as likely to result from withholding from a bishop the free exercise of his discretion. These considerations, if well founded, might be worthy of the attention of the legislature, but they cannot, as it seems to us, prevail against the Act as it stands. Moreover, if the legislation were to be reconsidered, it might possibly be thought that any such inconveniences would be outweighed by the object to which so much legislation has been directed, namely, the maintenance of uniformity of doctrine and ritual in the Church. It should be observed that this construction of the statute will not take from the bishop the discretion, which the judge previously possessed and exercised on the application for leave to promote the office of the judge, of judging whether the facts complained of constitute an ecclesiastical offence or not; for, as we have said, it is only to complaints of such offences that the Act relates. And the constitution of the commission, one member of which must be the bishop's officer or an archdeacon or rural dean of the diocese, and the rest are to be of his own selection, will insure a careful consideration of the case and protect an accused clergyman against frivolous and vexatious charges. When it is said on the part of the bishop that

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if he is not invested with the discretionary power for which he contends he must issue a commission in every case in which it is applied for, no matter how frivolous or vexatious the accusation may be, the answer is that no such consequence will follow. For if the application be of the character alluded to, this Court, in the exercise of its discretion, would refuse to issue a mandamus. And that this Court has the right to exercise such discretion cannot be doubted: see *Reg.* v. *Bishop of Chester* (1) and *Reg.* v. *Bishop of Chichester.* (2)

On the whole, therefore, the only conclusion at which we can arrive is that where complaint is made of that which constitutes in a clerk in orders an offence against the ecclesiastical law, the duty of issuing a commission is cast on the bishop, unless he thinks proper—and herein he undoubtedly has a discretion—to send the case at once by letters of request to the provincial court. The view we take of the enactment in question is confirmed by the opinion of the late Dr. Lushington, we need not say a great authority in all matters of ecclesiastical law. His opinion on this point appears from a report of a case of *Ditcher* v. *Denison*, a proceeding against the Archdeacon of Taunton, in which Dr. Lushington acted as assessor to the Archbishop of Canterbury, and which was cited by Dr. Stephens on an application to this Court for a mandamus to the Bishop of London in the case of Mr. Bennett. Referring to the 3rd section of the Act, Dr. Lushington there says, "It is perfectly clear that if a bishop under this statute thinks fit, he has a discretion which he is entitled to exercise whether he will himself of his own mere motion direct proceedings to be commenced. It is not so with reference to an application made to the bishop, and for various reasons. If it were so, the ancient law of the Church would have been subverted by this statute, which there was no intention to do." Having cited the judgments of Lord Stowell and Sir John Nicholl with respect to the former state of the law, Dr. Lushington proceeds: "What would be the consequence if the archbishop or bishop had a purely discretionary power to order the commencement of the proceedings according to his own judgment, or, I might also say, according to his fancy? Why, in every bishopric within a

(1) 1 T. R. 396–403. (2) 2 E. & E. 209–223.

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province or within the whole kingdom of England it would rest entirely in the power of a single bishop either to permit a prosecution against any ecclesiastic for any alleged unsound doctrine or immoral conduct, or, according to his own mere opinion, he might prevent any discussion taking place, and any charge, however serious, from being considered. The consequence of which would be that the uniformity which now happily prevails among the clergy of this country would be destroyed or subverted." In this view we entirely concur, and it is materially confirmed by the fact that the uniformity on which Dr. Lushington congratulated his hearers has unhappily ceased to exist. If the construction contended for by the bishop should prevail, looking at the wide differences of opinion which exist among the clergy in reference to rites and ceremonies, it might well be that in a short time uniformity in the realm might disappear, and diocesan uniformity take its place, which again would be liable to vary with each succeeding ordinary. Whereas if the law is to be enforced, any doubtful or disputed question of doctrine or ritual may be brought to the test of legal decision, if necessary to that of the appellate tribunal in the last resort.

This being, in our opinion, the construction to be put on the Act of 1840, the question already adverted to presents itself, whether this statute has not been virtually abrogated by the Act of 1874, commonly called the Public Worship Regulation Act, the two statutes being in pari materiâ, and apparently inconsistent with one another. That the two statutes are in pari materiâ as regards offences relating to ritual is clear. Both were passed for the purpose of establishing a new method of proceeding in the trial of offences committed by clergymen in substitution for the previously existing procedure; the only difference in this respect being that, while the earlier Act refers to "any offence against the laws ecclesiastical" committed by any clerk in holy orders, the later statute enumerates the particular offences to which it is applicable —viz., first, "where any alteration in, or addition to, the fabric, ornaments, or furniture of a church without lawful authority, or any desecration forbidden by law, has been introduced into it; secondly, where the incumbent has within the preceding twelve months used or permitted to be used in a church or burial-ground

any unlawful ornament of the minister of the church, or neglected to use any prescribed ornament or vesture; or, thirdly, where the incumbent has failed to observe, or to cause to be observed, the directions contained in the Book of Common Prayer relating to the performance, in such church or burial-ground, of the services, rites, and ceremonies ordered by the said book, or has made, or permitted to be made, any unlawful addition to, alteration of, or omission from such services, rites, and ceremonies." It is, therefore, plain that, so far as relates to offences committed in the non-observance of the established ritual, both statutes apply to such offences as those which form the subject-matter of the complaint in the present instance. It would follow that if the enactments of the two statutes are inconsistent, the rule would apply that where two statutes are in pari materiâ, and their enactments cannot stand together, the later statute shall prevail, as being the later exponent of the legislative will. Now when we turn to the later statute we find an entirely new and different system and scheme of proceeding. Though the charge is still to be addressed to the bishop, in the form of a representation, it can no longer, unless when it is preferred by an archdeacon or a churchwarden, be made by a single individual, whether a parishioner or not, but requires the concurrence of three parishioners, or, in the case of cathedral or collegiate churches, of three inhabitants of the diocese. The commission of inquiry, which was at once the creation and the distinctive feature of the Act of 1840, is entirely superseded, while an absolute discretion is given to the bishop, who is required to further the suit in the manner prescribed by the Act, "unless he shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation;" in which case he is to state in writing the reasons for his opinion, which statement is to be deposited in the registry of the diocese, but apparently without any ulterior consequence; so that the bishop is not only made the sole judge and arbiter whether the suit shall proceed, with reference to the nature of the offence charged, or the facts on which the charge may be founded, but is enabled to take into account collateral circumstances, in themselves affording no answer to the accusation, or satisfaction to the parishioners complaining that the

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public worship is conducted otherwise than according to the ritual of the Church as by law established. It might seem at first sight difficult to conceive, in the face of so entire a change in the system of proceeding, that the legislature can have intended that the two statutes should stand together, and that the two modes of proceeding should remain equally open to parties desirous of prosecuting a suit for an offence of this nature; or that while three parishioners are needed under the later Act to set the bishop in motion, who then has an arbitrary discretion to determine whether the suit shall proceed or not, it shall still remain open under the earlier Act to a single individual, whether parishioner or not, to compel the bishop, however unwilling, to put the statutory process in motion. We should, therefore, with reference to the rule just referred to, have been disposed to hold that the earlier statute was virtually repealed, and, consequently, that it was not open to the complainant to insist on its application in the present instance. But we are met by the positive enactment contained in the 5th section of the later statute—"that nothing in this Act contained, except as herein expressly provided, shall be construed to affect or repeal any jurisdiction which may now be in force for the due administration of ecclesiastical law." Now, not only was the jurisdiction given by the Church Discipline Act in force when the Public Worship Act passed, but, with the exception of the appellate jurisdiction of the Judicial Committee of the Privy Council in ecclesiastical suits, to which this saving provision can scarcely have been intended to apply, it was the only jurisdiction in penal matters then in force. And the 18th section of the later statute is conclusive; for it expressly provides that where sentence has been pronounced against an incumbent for an offence under the Act of 3 & 4 Vict. c. 86, he shall not be proceeded against under this Act; and where any judgment has been so pronounced under this Act, he shall not be liable to be proceeded against under the former statute; thereby conclusively indicating than an offence within the Public Worship Act may still be proceeded against under the earlier statute. This apparently conflicting legislation is, however, perhaps capable of being reconciled. The purpose and effect of it appears to be this: The proceeding by commission and the cumbrous

procedure by articles in a formal suit being deemed too dilatory in cases of flagrant ritualistic excesses, a more expeditious mode of proceeding and a simpler procedure were made available, subject, however, to more rigorous conditions. If the more expeditious process of the Public Worship Regulation Act, in which preliminary inquiry is dispensed with, is invoked, the stricter conditions of the Act as to the number of the complainants and their subjection to the absolute discretion of the bishop must be complied with. But it still remains open to a party who is willing to adopt the more elaborate process to claim under the former Act the remedy which it affords.

All that remains to be considered is whether, the writ of mandamus being a discretionary writ, we should, in the exercise of the discretion which we are undoubtedly at liberty to exercise, decline to issue the writ in this instance. We cannot but be sensible of the apparent incongruity which is involved in the interference of a temporal Court between a bishop and one of his clergy in a matter of ecclesiastical discipline. But it must be remembered that there is a third element in the case which must not be lost sight of. In these questions of doctrine or ritual the laity are interested, and deeply interested, as well as the clergy. As an institution maintained and endowed by the state—seeing that the legal right to tithes was originally established, as we are told historically, by Acts of state, and that the power to disestablish the Church and to appropriate its revenues—as in the dissolution of the monasteries, and in the recent dealing with the Irish Church — has been exercised by the legislature, and might be so again — the Church is upheld and exists for the spiritual benefit of the laity. It is the right of the latter to take part, under the ministration of the clergy, in the public worship, as also to have the benefit of the various rites and services of the Church, according to the ritual of the Church as by law ascertained and established. One of their most sacred and valued rights is infringed when they are driven to abandon their churches by the introduction of a ritual which is not that of the Church, and which appears to them to be an advance towards a religion which is not that of the Reformation. It is unnecessary to express any opinion as to the decision which was come to in this respect by this Court

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in the case of *Reg.* v. *Bishop of Chichester* (1), further than that, as it may be assumed that, prior to the passing of the Church Discipline Act, a stranger, acting bonâ fide, would have had no difficulty in obtaining permission to promote the office of the judge in such a suit, as one of the public, in a matter of so much concern to the community as the maintenance of the public worship of the Church as by law established, if the case of a stranger applying for a mandamus under such circumstances should again occur, we might think it necessary to reconsider the matter before we should be prepared to follow the precedent set in that case. But in this case we have no such difficulty as there presented itself. We have here a parishioner, who, as such, has an undoubted right to have the services of the Church performed in the church of the parish to which he belongs, according to the law of the Church as established by the rubric, the canons, and the Act of Uniformity, complaining that by reason of unlawful practices introduced into the Communion Service, his religious sense is so offended that he cannot conscientiously take part in the administration of the Sacrament, and demanding inquiry. There cannot be a doubt that a person so circumstanced would, prior to the Church Discipline Act, have been admitted to prosecute as of right, or that his application to promote the office of the judge, the bona fides and substantial character of his complaint not being open to doubt, would have been granted as a matter of course. We are of opinion that under such circumstances we have no alternative but to grant the writ of mandamus. It would have been a very different thing if the bishop had declined to grant a commission, on the ground that the complaint was frivolous and vexatious, or that it had been prompted by sinister or unworthy motives. Under such circumstances we should have felt ourselves justified in refusing the writ; but nothing of the kind exists here. It is admitted that there has been such a substantial departure by the incumbent from the established ritual as amounts to an offence against the ecclesiastical law. It is not denied that the practices complained of were such as might give offence to the religious conscience of a member of the Established Church, and deter him from taking part in the service of the Communion when thus admi-

(1) 2 E. & E. 209.

nistered. The refusal of the commission by the bishop is founded, not on the nature of the complaint, or the claim of the applicant to redress, but on collateral and extraneous circumstances which do not alter or affect the offence—on considerations of expediency, or such as have reference to the person of the party against whom the application is made. Now, not only do we think that, on the construction of the statute, the bishop had no discretion in this matter, but we are further of opinion that, the purpose of this legislation being to maintain uniformity of doctrine and ritual, and it being the right of the parishioners to have the services of the Church performed according to the law of the Church, even if the bishop had discretionary authority in such a case, he ought, having here a judicial, or, at all events, a quasi-judicial duty to discharge, to have used it to allow an inquiry to take place. We do not think, therefore, that we should be justified as matter of discretion in withholding the writ. It was, however, suggested that the Public Worship Regulation Act having made the concurrence of three parishioners necessary to found a complaint to the bishop, we ought not, in the exercise of our discretion, to give effect by mandamus to the complaint of one. But the obvious answer is that if the legislature had intended that any change in this respect should be made in the Church Discipline Act, which it advisedly keeps alive, it could have introduced such a provision into the later Act. If it was incumbent on the bishop to entertain the complaint on the application of a single parishioner—and we think he had no discretion in the matter—it cannot be open to us as a matter of discretion to withhold the redress which the applicant seeks at our hands. The rule for a mandamus to the bishop to issue a commission, or, in the alternative, to send the case at once to the Court of Arches by letters of request, must therefore be made absolute.

Rule absolute.

Solicitor for prosecutor: *Girdlestone.*
Solicitors for the Rev. Mr. Carter: *Brookes & Co.*

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Feb. 24.

TURQUAND AND THE CAPITAL AND COUNTIES BANK *v.* FEARON.

Practice—Application to add Plaintiff—Order XVI., rule 2—Assignor and Assignee of Chose in Action—Indemnity, when required.

In an action by the equitable assignee of a debt, or chose in action, an application under Order XVI., rule 2, to add the name of the assignor as plaintiff, will only be granted upon proof of his consent, or that he has been communicated with and all terms necessary for his protection from liability offered to him.

MOTION to rescind an order of Pollock, B., at chambers, for the amendment of the writ in this action by adding the name of one Henry Darling, as plaintiff.

It appeared that Willis, Percival, & Co., a firm of bankers, were in the habit of discounting bills for Darling, and that in August, 1874, the defendant gave Darling a guarantee for bills drawn by him upon and accepted by a firm of Shearer, Smith, & Co., and discounted by Willis & Co. This guarantee was handed by Darling to Willis & Co., who on the faith of it discounted bills drawn by Darling upon, and accepted by, Shearer, Smith, & Co. In March, 1878, Willis & Co. presented a petition for liquidation, and the plaintiff, Turquand, was appointed trustee under the liquidation. Subsequently Turquand assigned to the Capital and Counties Bank the assets and book debts of Willis & Co., and an action upon the guarantee was commenced in the name of Turquand and the bank. After action brought it was discovered that the guarantee was made out to Darling, and a summons was taken out before the master for leave to add his name as additional plaintiff under Order XVI., rule 2. There being nothing to shew that Darling consented to his name being so added, or that any indemnity had been tendered to him, the master dismissed the application, but on appeal Pollock, B., made an order in the terms of the summons.

Cohen, Q.C., and *Lamaison*, for the defendant. The order cannot be upheld, for it gives leave to add Darling's name as plaintiff, without imposing any terms to protect either him, or the defendant if Darling were hereafter to bring another action against him. It

was made without Darling's consent, and without giving him an opportunity of being heard. The general practice of the Chancery Division is to refuse leave to add the name of any one as plaintiff without proof of his consent, and if the consent cannot be obtained the person sought to be joined must be made a defendant in the action. There was a mere equitable assignment of the guarantee to Willis & Co. without any power of attorney enabling them to use Darling's name.

Gore, for the plaintiffs, in support of the order. The defendant cannot object to the order on the ground that it was made without proof of Darling's consent. Darling may possibly be enabled to ask that the action may be stayed until he is indemnified against the costs, the course adopted in *Laws* v. *Bott* (1); but this is a matter which gives the defendant no right to interfere. In *Auster* v. *Holland* (2), an action brought by a wife against her husband in the name of the trustee under a marriage settlement, the Court refused, on the defendant's application, to set aside the proceedings on the ground that the action was brought without the authority of the trustee, upon its being shewn that she (the trustee) had, without assigning any reason, refused to allow her name to be used. In *Duckett* v. *Gover* (3), where an action was brought by shareholders for the company, leave was given to add the company as plaintiffs, without the production of any authority to sue in their name.

[FIELD, J. Is it just that a man who has equitably assigned a security should be liable to have his name used as plaintiff without his consent, and be compelled to consult a solicitor and take proceedings before he can get an indemnity ?]

Order XVI., rule 8, which, by leave of the Court, enables married women to take proceedings without the concurrence of their husbands, shews that it was not meant to give a nominal plaintiff control over actions.

Cohen, Q.C., in reply. Before the Judicature Act, an action could not be brought in the name of a person other than the real plaintiff, without his consent, or at least, without an application for his consent and the tender of an indemnity. *Spicer* v. *Todd* (4);

(1) 16 M. & W. 300.
(2) 3 D. & L. 740.
(3) 6 Ch. D. 82.
(4) 1 Dowl. 306.

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Harrison v. *Almond.* (1) And secondly, a defendant may object that the action is brought without the authority of the nominal plaintiff: *Robson* v. *Eaton* (2); *Hubbart* v. *Phillips* (3); *Hoskins* v. *Phillips* (4); *Reynolds* v. *Howell.* (5)

MELLOR, J. I think that the order of Pollock, B., must be rescinded. The question turns upon the construction to be put upon Order XVI., rule 2, as to adding a plaintiff or plaintiffs, and two constructions of this rule have been suggested; one being that it enables an order to be made to add a plaintiff without his consent, and without imposing any terms upon the original plaintiff, and the other that the rule contemplates that the person whose name is proposed to be added should consent, or that proof should be given that he has been served with the summons and all proper steps taken to procure his consent. I myself should imagine that the rule was meant to apply to cases where after action brought it was discovered that some person ought to have been included as plaintiff, as where a new partner had come into the firm before the contract or dealing in question, but that it was not meant to confer upon the judge unlimited discretion to remodel the proceedings. I cannot think that it was meant to leave the party whom it is proposed to add as plaintiff, to apply to have terms inserted in the order for his own protection. It is for the original plaintiff himself in the first instance, to shew that the omission was owing to bonâ fide mistake, and that he has complied with any terms which a judge under the circumstances would think proper to impose. And inasmuch as I think the plaintiffs have not fulfilled what are the necessary preliminaries to this application, I think the rule must be made absolute.

FIELD, J. I am of the same opinion. The two plaintiffs, the liquidator and the company to whom he assigned the debts vested in him, brought this action upon a guarantee which they supposed had been given to the insolvent bank. It seems that this document had been mislaid, that it was ultimately found, and that it was then discovered that it was in favour of Darling

(1) 4 Dowl. 321.
(2) 1 T. R. 62.
(3) 13 M. & W. 702.
(4) 16 L. J. (Q.B.) 339.
(5) Law Rep. 8 Q. B. 398.

and not the bank. The plaintiffs had, therefore, by a bonâ fide mistake, omitted to bring the action in Darling's name. It may be that he is the only person in whose name the action can be brought, I cannot say precisely, for the materials before me are scanty. I do not yet know whether Darling gave the bank any power to use his name. Well, the plaintiffs apply for permission to add Darling's name. Under the Common Law Procedure Act, 1852, a plaintiff could only be added with his consent, and as far as I know, there was before the Judicature Act came into operation, and I believe still is, a rule by which the trustee of a bankrupt partner could only be allowed to sue in the name of the solvent partner, after giving him notice of an application to the Court for authority to use his name. The reason why it is not just to use Darling's name without his permission or securing him is, that otherwise an attempt may be made to make him liable to the defendant's costs on the ground that he had heard of the proceedings and acquiesced in them. And it is just that the defendant should be allowed to object to the proposed amendment, because, if he does not, and the action goes on, Darling may come at some future period and ask to have the proceedings stayed on the ground that he did not authorize them, so that the defendant cannot get his costs from him.

Rule absolute.

Solicitors for plaintiffs: *H. Kimber & Co.*
Solicitors for defendant: *Herbert & Kent.*

1879
March 22.

[CROWN CASES RESERVED.]

THE QUEEN *v.* HERMANN.

Coin, False or Counterfeit—Statute 24 & 25 *Vict. c.* 99, *s.* 9—*Uttering Counterfeit Coin.*

A genuine sovereign, had been fraudulently filed at the edges to such an extent as to reduce the weight by one twenty-fourth part, and to remove the milling entirely, or almost entirely, and a new milling had been added in order to restore the appearance of the coin:—

Held, by Lord Coleridge, C.J., Pollock and Huddleston, BB., (Lush and Stephen, JJ. dissenting), that the coin was false and counterfeit, within 24 & 25 Vict. c. 99, s. 9.

THE following case was stated by the Recorder of Liverpool for the opinion of this Court:—

"The prisoner Robert Hermann was convicted before me at a sessions held on the 7th of January, 1879, on an indictment under 24 & 25 Vict. c. 99, s. 9, 'An Act to consolidate and amend the Statute Law of the United Kingdom against offences relating to the Coin,' for uttering and putting off two false and counterfeit sovereigns, knowing them to be false and counterfeit.

"The evidence of uttering and of guilty knowledge was complete, but I desire to submit to the Court the question whether the coins which were uttered could properly be held to be false and counterfeit coins within the meaning of the statute in question. They were, or had been, real sovereigns coined at the Mint. They were both of her Majesty's reign, one dated 1872, and the other 1875.

"They had been fraudulently filed at the edges to such an extent as to reduce the weight by one twenty-fourth part. The effect of the filing was to remove the milling entirely, or almost entirely. In order to restore the appearance of the coins, a new milling had been made on each coin with tools. It appeared to me that this was a counterfeit milling, and that a coin upon which any part of the impression was counterfeit was a counterfeit coin. The jury convicted the prisoner. The prisoner had previously been tried under the fourth section of the same Act, and acquitted for want of evidence that the act of lightening or diminishing had been done by himself."

No counsel appeared for the prisoner.

Eyre Lloyd, for the prosecution. The question is whether the coins uttered by the prisoner can be considered false or counterfeit within s. 9 of 24 & 25 Vict. c. 99, which is as follows:—"Whosoever shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble, or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall in England . . . . be guilty of a misdemeanour, &c." By s. 1 of the same statute it is enacted that, "In the interpretation of, and for the purposes of this Act, the expression 'the Queen's current gold or silver coin' shall include any gold or silver coin coined in any of her Majesty's mints, or lawfully current, ... and the expression 'false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the Queen's current gold or silver coin' shall include any of the current coin which shall have been gilt, silvered, washed, coloured, or cased over, or in any manner altered so as to resemble, or be apparently intended to resemble or pass for, any of the Queen's current coin of a higher denomination; and the expression 'the Queen's current coin' shall include any coin coined in any of her Majesty's mints." If the question is one of fact it has been decided by the jury against the prisoner. The conviction therefore should stand, unless it can be said that as a matter of law coins such as the present are not false or counterfeit within the above Act.

The coins, by the filing, were reduced below current coin (under 33 & 34 Vict. c. 10), and then, by the adding of the new milling, made to resemble current coin. "Counterfeit" means unreal, "something made so as to be other than that which it pretends to be." The words of 24 & 25 Vict. c. 99, s. 1, do not cut down the operation of s. 9. The object of s. 1 is to extend the meaning of expressions used in the Act, not to prevent such expressions having their natural effect. This is evident from the use of the phrase "shall include" in the section. In *Reg.* v. *Kershaw* (1) the effect of an interpretation clause somewhat analogous to the one now in question is dealt with, and it is there pointed out by Erle, J., that the word "include" is used by way of extension.

(1) 6 E. & B. 999, 1007; 26 L. J. (M.C.) 19.

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[STEPHEN, J. Does every one knowingly passing a light coin utter a counterfeit coin?]

No; nor is it necessary to contend so, because here something has been done to the coins which were light to conceal their lightness and to make them resemble true coins of full weight.

STEPHEN, J. I have arrived at the conclusion that these were not counterfeit or false coins. The interpretation clause of the statute (s. 1) says that the expression which is used in the section creating the offence, "false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the Queen's current gold or silver coin," shall include genuine coin treated in various ways, of which the present is not one, and it also says that the expression "the Queen's current coin" shall include any coin coined in any of her Majesty's mints. Now the coins in question were coined in one of such mints; they were not made to imitate; they were fraudulently lightened. I find no section making it a crime to pass a light sovereign with a knowledge that it is light, though I do find a section (s. 4) making it a crime to lighten such a coin, so that it may pass in its lightened state as current coin, and another section (s. 5) which deals with unlawful possession of clippings or filings of a coin so lightened.

When the prisoner passed the light coins, knowing them to be light, he committed, so far as I can see, no offence under the statute in question. Then arises the question, whether the fact that some one had put a new milling upon the coins before the prisoner passed them, as stated in the case, alters the matter. What the prisoner did was this, he knowingly passed light sovereigns, upon which some one had put a new milling for the purpose of concealing the lightness, he passed genuine coins which had been fraudulently dealt with, not false or counterfeit coins.

HUDDLESTON, B. The conviction in this case was under s. 9 of 24 & 25 Vict. c. 99. The case finds that the milling was in the first instance entirely, or almost entirely, removed. This prevented the coins having the appearance of current coins; then, to restore the appearance, a false milling was added. Without

the milling the coins would not have been current coin; but, to make them pass and resemble perfect coins, a counterfeit milling was added. The case is, in my judgment, within the section.

POLLOCK, B. I think the prisoner was properly convicted. It is sufficient to say that the section contains clear affirmative language within which the facts bring the present case. The coins were false or counterfeit coins intended to pass for current coins, for a sovereign from which the milling has been fraudulently removed ceases to be current coin, but is something else intended to resemble current coin. It is like the case of a man taking part of the gold out of a sovereign, and filling up the hollow left with alloy, and then passing it as genuine. It is substantially a passing of a false and counterfeit coin.

LUSH, J. I cannot, I regret to say, agree in the conclusion arrived at by the majority of the Court. I think to hold the present case to be within the section would be to strain the meaning of the word "counterfeit." The coins were issued by the Queen; they were current coins before they were clipped. Coins only clipped remain current coin within the statute. The expression "the Queen's current coin" includes any coin coined in any of her Majesty's mints. The word "counterfeit" involves the idea of spuriousness. A counterfeit is a spurious imitation intended to resemble something which is not. The Act, by definition, makes genuine coins tampered with in certain specified ways "counterfeit" within the section, but for that definition such coins would not be counterfeit, and, but for s. 1, a farthing gilded to represent a sovereign would not be a counterfeit coin. There is nothing in this section which extends the words "false or counterfeit" to the present case. There is another section as to lightening any of the Queen's current coin, but there is no section as to passing coin so lightened. Cutting off gold does not make a coin counterfeit. But it is said adding a milling to a coin makes it counterfeit. I do not think it does. The whole coin is still one that issued from the Mint. It is not like adding alloy to counterbalance gold abstracted from the coin.

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LORD COLERIDGE, C.J. I am clearly of opinion that the present case is within the 9th section of the statute. The coins were counterfeit in the strict and grammatical sense of the word, they were made other than that they ought to be, they were made to resemble that which they were not.

They were not perfect and whole sovereigns; they were imperfect coin, milled so as to conceal their imperfections. It may be that it is wrong to place too much reliance upon strict or grammatical meanings in construing words in an Act of Parliament. I therefore desire to say that if the word "counterfeit" is to be taken in its ordinary or popular sense these coins seem to me to be counterfeit. In the ordinary sense of this word the idea of imitation is conveyed. These sovereigns had been filed, and then a new milling added to make them imitate current gold coin, to "restore the appearance" as the case states. Before the milling was put on they were not perfect sovereigns, then by milling they are made to look like current sovereigns. The interpretation section (sect. 1) adds strength to my view. The words "shall include" are not identical with, or put for, "shall mean." The definition does not purport to be complete or exhaustive. By no means does it exclude any interpretation which the sections of the Act would otherwise have, it merely provides that certain specified cases shall be included. It is to include taking a farthing and gilding it, though the farthing is a coin with an obverse and reverse differing from a sovereign, so that the eye by looking would detect the difference, and where there can scarcely be said to be imitation, or more than a mere surface change of the farthing, without any resemblance to a genuine sovereign. These coins were passed for whole sovereigns, and made so to pass by the operation of giving them false millings. The conviction must be affirmed.

Conviction affirmed.

Solicitor for prosecution: *Solicitor to the Treasury.*

[IN THE COURT OF APPEAL.]

1879
Feb. 15.

STOREY *v.* WADDLE.

Practice—Transfer of Action to Chancery Division—Counter-claim for Rectification of Deed and Specific Performance—Judicature Act, 1873, *s.* 34, *Rules of Court, Order LI., r.* 2.

The vendor of a piece of land brought an action in the Queen's Bench Division against the purchaser for trespassing on an adjoining piece of land.

The defendant alleged in his defence, that the plaintiff had agreed to grant him a right of way over the last-mentioned piece of land, and delivered a counter-claim claiming rectification of the deed of conveyance by inserting a grant of such right of way. He also claimed specific performance of an alleged agreement to sell him another adjoining piece of land. The defendant then moved to transfer the action to the Chancery Division:—

Held, affirming the decision of the Queen's Bench Divisional Court, that the relief asked by the counter-claim was not a sufficient ground for transferring the action to the Chancery Division.

Quære, whether the Court of Appeal has power to order the transfer of an action without the consent of the president of the Division from which it is to be transferred.

THE plaintiff in this case was the owner of some building land at East Boldon, in the county of Durham. In February, 1874, he sold and conveyed a piece of land to the defendant, on which the defendant had since built a house. The plaintiff commenced an action in the Queen's Bench Division, complaining that the defendant committed acts of trespass by passing over the plaintiff's land to an adjoining high road, and the plaintiff claimed an injunction to restrain the defendant from repeating the trespass, and damages for the trespass already committed.

The defendant delivered a statement of defence and a counter-claim, by which he alleged that, on the occasion of the purchase from the plaintiff, the plaintiff had agreed to grant him a right of way over the land in question which ought to have been included in the conveyance; and he claimed to have the deed of February, 1874, rectified by the insertion of a grant of such right of way. The defendant also in the counter-claim claimed specific performance of an alleged agreement by the plaintiff to sell him another small piece of land adjoining the piece purchased in 1874.

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The defendant, having delivered his statement of defence and counter-claim, applied to Mr. Justice Field, in chambers, for a transfer of the action to the Chancery Division; but the application was refused, and the decision was affirmed by the Divisional Court, the president of the Queen's Bench Division being one of the judges present.

The defendant then appealed to the Court of Appeal.

Caldecott, for the defendant. The Chancery Division alone has the requisite machinery for dealing with such matters as the rectification of a deed and the specific performance of a contract. Original actions for relief of that nature are expressly assigned by s. 34 of the Judicature Act, 1873, to the Chancery Division; therefore, when such relief is prayed in a counter-claim, the Court is following the spirit of the Act in transferring the action to the same Division. In *Holloway* v. *York* (1), the Court of Appeal ordered a transfer in a similar case from the Exchequer to the Chancery Division.

Shield, for the plaintiff, was not called on.

JAMES, L.J. The particular point does not seem to have been considered in *Holloway* v. *York* (1), but having regard to the 1st and 2nd rules of Order LI., I doubt very much if we have power to make the transfer without the consent of the presidents of both the Divisions from and to which the transfer is proposed to be made; and here the president of the Queen's Bench Division has himself refused to allow the transfer. But independently of that objection, I think we should be repealing a great part of the Judicature Act, if we were to accede to this application. At any rate, we should be acting contrary to the principle that each Division of the Court is to determine everything which arises in a matter which comes before it. If such a transfer as this were allowed, any defendant might put in a counter-claim for the specific performance of some agreement, and then apply for a transfer, and thus everything might, at the will of the defendant, be brought into the Chancery Division. I think we have no jurisdiction to

(1) 2 Ex. D. 333.

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make this order; or, if we have, we ought not to interfere with the exercise of the discretion of the Queen's Bench Division.

BRAMWELL, L.J., and BRETT, L.J., concurred.

Solicitors for plaintiff: *Maples, Teesdale, & Co., agents for Steel, Sunderland.*

Solicitors for defendant: *Shum, Crossman, & Co., agents for Kidson, Son, & Mackenzie, Sunderland.*

STACEY, APPELLANT; LINTELL, RESPONDENT.

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March 28.

Bastardy—Mother of Bastard Child Married at Date of Application for Affiliation Order—7 & 8 Vict. c. 101, *s.* 5; 35 *&* 36 *Vict. c.* 65, *s.* 3.

The 35 & 36 Vict. c. 65, s. 3 enacts, that "any single woman who may be with child, or who may be delivered of a bastard child, may either before the birth or at any time within twelve months from the birth of such child . . . . make application for a summons against the putative father:"—

Held, that no such application can be made when the mother has married since the birth of the child, and is at the time of the application living with her husband.

CASE stated by justices for Chepping Wycombe, Buckingham, under 20 & 21 Vict. c. 43.

An information was preferred under 35 & 36 Vict. c. 65 (1), by Sarah Stacey, formerly Sarah Cogdell (the appellant), against Charles Lintell (the respondent), charging that she had been delivered of a bastard child, of which he was the father.

1. Upon the hearing it was proved that the appellant at the time of the birth of the child mentioned in the information, namely, in January, 1876, was a single woman, and she deposed that the respondent was the father of the child, and that his

(1) The Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 651), s. 3: "Any single woman who may be with child, or who may be delivered of a bastard child after the passing of this Act may either before the birth, or at any time within twelve months from the birth of such child, or at any time thereafter upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance, make application for a summons to be served upon the man alleged by her to be the father of such child."

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wife within twelve months next after the birth of the child paid her money, which the appellant considered was intended for its maintenance. In cross-examination it appeared that since the birth of the child, but previous to the preferring of the information, namely, on the 16th of February, 1878, the appellant had intermarried with, and become the wife of, Edward Stacey, and was at the date of the hearing living with him as his wife.

2. It was thereupon contended that the appellant was not a single woman, within the meaning of s. 3 of 35 & 36 Vict. c. 65, and that an order to affiliate the child could not under the circumstances be made on her application.

3. The justices in the absence of any decision as to the words "single woman" applying to a married woman living with her husband at the time of the application and hearing, dismissed the information, without going into further evidence as to the respondent being the father of the child, or having paid money as alleged in the information, on the ground that the appellant was not entitled to prefer the information, or to obtain an order thereon, because she was a married woman and living with her husband at the time the information was preferred and came on for hearing.

4. The question for the opinion of the Court was whether an order to affiliate the child named in the information could, under the circumstances, be made on the application of the appellant.

Graham, for the appellant. The marriage of the mother after the birth of her child did not disqualify her from obtaining an order for its maintenance. 35 & 36 Vict. c. 65, which by s. 3 enacts, that "any single woman who may be with child, or who may be delivered of a bastard child may make application for a summons," repeals (in the first schedule) the proviso in 7 & 8 Vict. c. 101, s. 5 (1), to the effect that a bastardy order shall not operate after the marriage of the mother of the child, and the

(1) 7 & 8 Vict. c. 101, s. 5:—"Provided always that no order for the maintenance or support of any bastard child shall, except for the purpose of recovering money previously due under such order, be of any force or validity after the child in respect of whom it was made has attained the age of thirteen years, or after the marriage of the mother of such child, or after the death of such child." [Repealed by 35 & 36 Vict. c. 65, fourth schedule.]

proviso having been repealed there is nothing to shew that the marriage of the mother is any objection to the order.

[Lush, J. It is true that 35 & 36 Vict. c. 65, repeals the proviso, but it still only enables any *single* woman to make the application.]

It must be conceded that the applicant could have made the application before her marriage, and the Act does not say that her marriage shall deprive her of this vested right. Lastly, the Court will not put such a construction upon the term "single woman" as to defeat this application, but will follow the decisions upon the same term in the earlier bastardy statutes. In *Reg.* v. *Collingwood* (1) an order for the maintenance of a bastard child was upheld, though it appeared by the order that the mother was a married woman, the Court following *Rex* v. *Luffe* (2), where 6 Geo. 2, c. 31, was held to warrant an order on the putative father of the bastard child of a married woman, inasmuch as it was born out of lawful matrimony.

Croome, for the respondent. The Act 35 & 36 Vict. c. 65, confines the right to make the application to a single woman, and the repeal of the proviso in 7 & 8 Vict. c. 101, s. 5, at the utmost restores the law which prevailed before that Act. The previous law was contained in 4 & 5 Wm. 4, c. 76, and it was held in *Lang* v. *Spicer* (3), upon the construction of s. 57, which makes the husband liable to maintain the children of his wife born before marriage, that upon the marriage of the mother the putative father ceased to be liable for the support of a bastard child. In *Reg.* v. *Pilkington* (4), where the mother of the bastard child was a married woman, she was living apart from her husband, which is not the case here. If the putative father continues liable after the marriage of the mother, the effect of the Acts will be to make both him and her husband liable for the support of the child.

Graham, in reply.

MELLOR, J. I am of opinion that the justices were right, and that the mother did not come within the description of a "single

(1) 12 Q. B. 681.
(2) 8 East, 193.
(3) 1 M. & W. 129.
(4) 2 E. & B. 546; 22 L. J. (M.C.) 153.

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woman," to whom the right to make the application is restricted under 35 & 36 Vict. c. 65, s. 3. The reasoning followed by the Court in *Lang* v. *Spicer* (1), appears to me to be applicable to this case—that a woman who marries after the birth of her child ought not to be allowed to proceed against the putative father, inasmuch as her husband has become liable to support the child, and it could not have been the intention of the legislature to establish a double liability for its maintenance. And further, the words of the section taken in their ordinary meaning are unfavourable to this application. It is unnecessary for us to discuss the cases which have decided, upon the construction of the earlier bastardy statutes, that the term "single woman" is not restricted to a woman who has never married, for in the present case the mother at the time of the application was not living separate from her husband as in those cases, so that the ground on which they proceeded—that there would otherwise be no provision for the child—is removed from our consideration.

LUSH, J. I am of the same opinion. The policy of the Bastardy Acts is to assist the mother in maintaining a child which has no legitimate father, and is dependent upon her for support. It has been settled by decisions upon the construction of the earlier Acts, that the term "single woman" is not confined to unmarried women, but may include married women who are reduced to the condition of single women by widowhood or otherwise. The Act 4 & 5 Wm. 4, c. 76, s. 57, makes the husband liable to maintain the illegitimate child of his wife born before the marriage, so that as soon as the mother of a bastard child marries there is a person as much bound to maintain it as though it were his own child. The proviso to 7 & 8 Vict. c. 101, s. 5, by which an order for the maintenance of a bastard child is to cease after the marriage of the mother, has been purposely omitted from the present Act, and upon this omission the argument has been based, that it was not meant that the marriage of the mother should disqualify her from applying for an order. But I think the only effect of this omission is to prevent an order duly made from becoming wholly void on the marriage of the mother, and to leave

(1) 1 M. & W. 129.

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it in the discretion of the justices to allow the order to continue until the child has reached the prescribed age. It is another question whether the applicant was a "single woman" qualified to apply for the order, and I think that having married and living with her husband she cannot be considered as a "single woman" within any construction which has been put on the term.

Judgment for the respondent.

Solicitors for appellant: *King & McMillin.*
Solicitor for respondent: *D. Clarke, High Wycombe.*

[IN THE COURT OF APPEAL.]

Dec. 7.

ELMSLIE AND OTHERS *v.* CORRIE.

Bankruptcy—Liquidation by Arrangement—Creditor, Omission of Name and Address of, from Statement of Assets and Debts—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 49, 125.

A certificate of discharge obtained by a debtor who has filed a petition for liquidation by arrangement under the Bankruptcy Act, 1869, s. 125, is valid against a creditor, whose name has been omitted by the debtor from the list of creditors delivered to the registrar.

5 Q.B.D. 470
473
16 C.L.D. 204
20 C.L.D. 436

WRIT dated the 12th of December, 1877, specially indorsed, for 264*l.*, for fees for work done and money expended by the plaintiffs as solicitors on the defendant's retainer. The plaintiffs gave the defendant notice that their claim appeared by the indorsement on the writ of summons.

Defence stated (among other things) that on the 9th of December, 1876, the defendant filed his petition in the Bankruptcy Court of Hampshire, holden at Newport and Ryde, for a liquidation of his affairs by arrangement or composition, and thereupon a special resolution was passed, by which it was resolved that the defendant's affairs should be liquidated by arrangement; that a certain person therein mentioned should be appointed trustee of the defendant's estate; that this resolution was duly registered. And on the 2nd of March, 1877, the defendant duly

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obtained his certificate of discharge from the registrar of the said county court.

Reply: That the plaintiffs' names were not included in the list of creditors delivered by the defendant to the registrar of the county court, pursuant to the provisions of the Bankruptcy Act, 1869, and that no notice of the first meeting of the creditors of the defendant, under the proceedings in liquidation, was given to the plaintiffs pursuant to the provisions of the said Act; that the plaintiffs did not vote at the meeting of creditors, nor did they prove their debt, nor receive a dividend thereon under the said liquidation, of which proceedings they have been always altogether ignorant.

Issue thereon.

At the trial at the Middlesex Trinity Sittings, 1878, before Lord Coleridge, C.J., the facts stated in the statement of defence and the reply were proved, and Lord Coleridge, C.J., on the authority of *Heather* v. *Webb* (1), directed judgment to be entered for the defendant.

The plaintiffs appealed.

Herschell, Q.C., and *Crump*, for the plaintiffs. The question is whether, in a case of liquidation by arrangement under s. 125 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), the omission of the debtor to insert his creditors' name and address in the statement of debts is a good answer to a defence founded on the certificate in an action by a creditor for his debt. The point has been decided in the negative in *Heather* v. *Webb*. (1) On his appeal the Court is asked to review that decision. It is now settled law, according to *Breslauer* v. *Brown* (2) that a creditor whose name and address are not inserted in the debtor's statement, is not bound by the composition resolutions under s. 126. The words of s. 125, sub-s. 3, which relate to arrangements for liquidation, and of s. 126, which relate to composition with creditors, are identical. They are, the debtor "shall produce to the meeting a statement shewing the whole of his assets and debts, and the names and addresses of the creditors to whom his debts are due." But no doubt in s. 125 it is nowhere provided, as

(1) 2 C. P. D. 1. (2) 3 App. Cas. 672.

it is in s. 126, that the composition accepted by an extraordinary resolution shall be binding on all creditors whose names and addresses, and the amount of debts due to whom are shewn in the statement of the debtor, shewing by implication that the acceptance of the composition is binding only on those creditors whose names and addresses are inserted in the statement of debts. What, then, is the effect of the omission to insert the names and addresses of creditors in an arrangement for liquidation? Does it discharge the debtor from the debts of creditors whose names are not inserted? The provisions as to the discharge under s. 125 are to be found at the end of sub-s. 9: "The close of the liquidation may be fixed, and the discharge of the debtor and the release of the trustee may be granted by special resolution of the creditors in general meeting." That must mean that the discharge is to be granted by a resolution of creditors who can inspect the statement of debts and vote for or against the resolution, that is, the creditors whose names are inserted in the statement of debts. Sub-s. 10 provides the trustee shall report to the registrar the discharge of the debtor, and a certificate of such discharge given by the registrar shall have the same effect as an order of discharge given to a bankrupt. A certificate under this sub-section does not discharge a debtor as to a debt due to a creditor whose name is not inserted in the statement of debts, for such creditor could not vote and take part in the proceedings under sub-s. 9 granting the discharge. Further, a creditor omitted from the statement of debts cannot have an inspection of the accounts and assets and debts of the debtor. If the debtor under such circumstances is discharged, the creditor would be barred by proceedings in which he can take no part, and that by the act of the debtor. Further, 289 of the Bankruptcy Rules shews that the only remedy of a debtor is by applying to the Court of Bankruptcy to restrain the action.

W. G. Harrison, Q.C., and *Petheram*, for the defendant, were not called upon.

BRAMWELL, L.J. This is a very plain case. The Bankruptcy Act, 1869, s. 125, sub-s. 10, provides that a discharge in a liquidation by arrangement shall have the same effect as a discharge in a bankruptcy. But it has been contended that there is an

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exception to this general rule, and that the certificate of discharge given in a liquidation is not an answer to a claim, by a creditor, whose name is omitted from the list of creditors. Without some necessity we ought not to imply such an exemption. I do not see any reason for introducing the exception. I do not think that Rule 289 is intended to apply to the case where the debtor has obtained his discharge.

BRETT, L.J. If the name of a creditor is fraudulently omitted, the proceedings might have been set aside, and the creditor might sue for his debt. This exemption has been created by the express language of s. 127, whereas that which the plaintiffs wish to introduce is dependent only upon implication. The case of fraud is expressly dealt with; that of an innocent omission is not mentioned. I think the discharge is valid. As to the other point Rule 289 does not apply in favour of the plaintiffs.

COTTON, L.J. The omission is not fraudulent. I concur with the other members of the Court in the construction of the Bankruptcy Act, 1869, s. 125. All the conditions have been complied with, and the discharge is good.

Judgment affirmed.

Solicitors for plaintiffs: *Elmslie, Forsyth, & Sedgwick.*

Solicitors for defendant: *Ley & Mould, for Richard Urrey, Ryde.*

[IN THE COURT OF APPEAL.]

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Dec. 10.

FOWLER *v.* KNOOP.

Ship and Shipping—Bill of Lading, implied Obligation in, to unload Ship in reasonable Time—Bills of Lading Act, 1855 (18 & 19 *Vict. c.* 111.)

By a charterparty entered into between the plaintiff and G. it was agreed that the plaintiff's vessel should at the port of discharge be unloaded as fast as the custom of the port would allow. By the bill of lading, signed by the master, the cargo was stated to have been shipped by G. and was to be delivered to the defendant or his assigns, he or they paying freight for the goods as per charterparty. No time for the discharge of the cargo was mentioned in the bill of lading. At the port of discharge there was no custom as to unloading vessels, but a delay occurred in unloading the ship. The defendant never assigned the bill of lading, but before the arrival of the ship he sold the cargo, and the ultimate purchaser took delivery of it upon an order signed by the defendant:—

Held, 1. That, as there was no custom of the port of discharge as to unloading vessels, the charterparty did not by its terms vary the implied contract contained in the bill of lading to deliver the cargo within a reasonable time; 2. That the defendant, although he had parted with the beneficial interest in the cargo, was when the delay occurred a "consignee" within the Bills of Lading Act, 1855.

ACTION by the plaintiff, owner of the ship *Claudine*, against the defendant, consignee of cargo under a bill of lading, for not discharging the plaintiff's ship in a reasonable time on an implied obligation in the bill of lading, whereby the plaintiff lost the use of his ship for several days.

At the trial at the London Trinity Sittings, 1877, before Field, J., the following facts were proved. The plaintiff was the owner of the ship *Claudine*, and the defendant was a merchant in London carrying on business under the style of "W. Berkefeld & Co." On the 11th of September, 1875, a charterparty was made at Valparaiso between Gildemeister & Co. of the one part, and G. Jamieson, master of the *Claudine*, acting on behalf of the plaintiff, of the other part, which contained, amongst others, the following terms: that the ship should take in at the port of Iquique a full and complete cargo of nitrate of soda in bags, her cargo not to exceed 16,000 quintals Spanish weight, for conveyance to Queenstown or Falmouth. "Bill of lading to be signed by the master, weight and quality unknown: all on board to be delivered. For the loading of the cargo twenty working lay days

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shall be allowed to be reckoned from the day the master gives notice in writing to the charterer's agents of being ready to receive cargo. And should the vessel be detained by the charterers, or by their agents beyond the time before specified for loading or discharging the cargo in the aforesaid ports, demurrage shall be paid daily to the master or his order as shall become due at the rate of 10*l.* sterling or equivalent per day for each and every day's detention, afterwards such detention not to exceed ten running days. And should the vessel be unnecessarily detained by the master beyond the time herein specified demurrage shall be paid by him at the same rate and in the same manner to charterers or to their agents." "After receiving on board the cargo, the vessel shall proceed with all convenient speed to Queenstown or Falmouth for orders to discharge in a safe port in the United Kingdom; charterers by their agents to give the captain such orders within forty-eight hours of the receipt by them of written notice of the vessel's arrival, and shall in such discharge port, as ordered, deliver the whole of her cargo as fast as the custom of the port will allow, and so end the voyage. The parties of the first part agree to pay to the parties of the second part for freight of the vessel on a true and right delivery of the cargo in a safe port in the United Kingdom, according to the bills of lading and charterparty for each and every ton of 20 cwt. gross at the rate 62*s.*"

Gildemeister & Co. shipped 5290 bags of nitrate of soda on board the *Claudine*, for which the master on the 19th of November signed a bill of lading as follows: "Shipped in good order and condition by Gildemeister & Co. on board the British barque called the *Claudine*, whereof G. Jamieson is master, now lying in the port of Iquique and bound for Queenstown or Falmouth for orders, 5290 bags of nitrate of soda, weighing 15,586 quintals . . . and are to be delivered at the port of her final destination (the act of God, &c., excepted) unto W. Berkefeld & Co., London, or to their assigns, he or they paying freight for the goods as per charterparty and average accustomed."

On the 27th of September, 1875, a copy of the charter was sent by Gildemeister to the defendant, and on the 13th of October Gildemeister drew a bill of exchange on the defendant for

5000*l.* at ninety days' sight against the cargo, and also forwarded to them the bill of lading. On the 26th of November the defendant sold the cargo by the *Claudine* to be delivered at a safe port to the London Banking Association, who sold it to H. Bath & Co., who subsequently sold it to Gibbs & Co.

The *Claudine* sailed on her voyage, and on her arrival at the port of call was ordered to proceed to Plymouth; she arrived at the Great Western Docks at that port on the 7th of April, 1876. On the 8th of April, 1876, she was ready to discharge her cargo, the delivery of which began on that day, and was completed on the 27th of April, 1876. The cargo was delivered to Gibbs & Co. under delivery orders signed by the defendant. Gibbs & Co. never had the bill of lading indorsed to them, the defendant having sold the cargo before he received the bill of lading.

On these facts the jury found, in answer to questions left to them by the learned judge, that the defendant had taken an unreasonable time to discharge the vessel, and that there was no special custom of the port as to the rate and time at which cargo should be delivered, and they assessed the damages at 52*l.* 10*s.*

The learned judge reserved the case for further consideration, and decided that, notwithstanding the provisions contained in the charterparty as to discharging the vessel, there was a contract by the defendant, the consignee, under the bill of lading to take delivery of the cargo, and that the shipowner, the plaintiff, could sue the defendant for not taking delivery of it; and that this liability to take delivery arose as against the defendant by virtue of the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), s. 1 (1), and directed judgment to be entered for the plaintiff for 52*l.* 10*s.*

The defendant appealed.

Nov. 15. *Butt, Q.C.*, and *J. C. Mathew*, for the defendant. First, it is quite clear that under the bill of lading there is no express contract to pay demurrage. Here there is a charterparty, and it

(1) By 18 & 19 Vict. c. 111, s. 1: "Every consignee of goods named in a bill of lading, and every indorser of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

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is the guiding instrument between the shipper and the shipowner; there being an express stipulation in the charterparty as to the mode of unloading, no contract as to this can be implied in the bill of lading. If the charterparty had specified a certain number of days to unload, and the bill of lading had been silent or had stipulated for something different, the binding contract would have been that to be inferred from the charterparty. In ordinary cases the charterparty does contain the time allowed for unloading, and the charterparty must be the ruling document. If the charterparty mentioned twenty days for unloading and the bill of lading was silent as to the time, and ten days was a reasonable time in which to unload, could it be said that the law would imply a quicker rate of discharge than that mentioned in the charterparty? The Court, therefore, cannot imply from the bill of lading a term by the defendant, that he shall accept delivery within a reasonable time. Suppose A. charters a ship and stipulates she shall be discharged in twenty days; because he indorses the bill of lading does a different contract arise to unload the vessel? If the plaintiff is held to be entitled to recover, it will follow as matter of law that wherever there is a bill of lading in this form which has been transferred either to a consignee or an assignee, whether or not a charterparty exists, a contract by him to accept delivery within a reasonable time must be always implied. Secondly, it is for the plaintiff to shew that the defendant is a consignee within the Bills of Lading Act, 1855. That Act has no application to the present case, because "consignee" means a person who has the property in the goods vested in him. What the statute contemplates is, that the rights and liabilities under the bill of lading are to pass to those who have the bill of lading and the property in the goods at the same time. Here the defendant had sold the goods before he received the bill of lading, and Gibbs took delivery under a delivery order. The defendant is not a consignee within the Bills of Lading Act. In *Smurthwaite* v. *Wilkins* (1) it was held that the assignee of a bill of lading is liable on it only until he parts with it; here the defendant had sold the goods represented by the bill of lading, and he was only the nominal holder, therefore the principle of that case applies.

(1) 11 C. B. (N.S.) 842; 31 L. J. (C.P.) 215.

Further, the Bills of Lading Act, 1855, does not apply to cases where there is a charterparty.

November 16. *Cohen, Q.C.*, and *Wood Hill*, for the plaintiff. This case strongly resembles *Domett* v. *Beckford*. (1) In each case the defendant's goods were shipped, and carried to the port of discharge for his advantage, and it is only right that he should pay a consideration for the benefit thus accruing to him. The shipowner, no doubt, is bound to discharge within a reasonable time after arrival, and the consignee is bound by a correlative duty to accept delivery within a reasonable time, for the unloading of a vessel imposes concurrent liabilities upon both shipper and shipowner: *Ford* v. *Cotesworth* (2); and this obligation the consignee is bound to perform, although before he can take delivery it is necessary for him to obtain the authority of the governing powers at the port: *Hill* v. *Idle*. (3) The bill of lading is the contract under which the goods are shipped, per Blackburn, J., in *Fraser* v. *Telegraph Construction Co.* (4) The provision in the charterparty as to unloading has no effect, and may be considered as insensible, and the charterparty cannot vary the implied contract in the bill of lading which was that the ship should be discharged within a reasonable time.

Formerly, although the property in goods might pass upon a transfer of the bill of lading, yet the terms of the contract were not transferred, but under the Bills of Lading Act the contract for the carriage of the goods is to be deemed to have been made with the consignee. If, therefore, there is a breach, the shipowner is entitled to sue him on the contract. This case falls within the very words of the Bills of Lading Act, 1855, s. 1.

Nov. 19. *Butt, Q.C.*, in reply.

Cur. adv. vult.

Dec. 10. The judgment of the Court (Bramwell, Brett, and Cotton, L.JJ.) was delivered by

BRAMWELL, L.J. The defendant contended that as the charterparty contained a clause providing that the cargo should be

(1) 5 B. & Ad. 521.
(2) Law Rep. 4 Q. B. 127.
(3) 4 Camp. 327.
(4) Law Rep. 7 Q. B. at p. 571.

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delivered as fast as the custom of the port would allow, the bill of lading and the implied contract in it to deliver within a reasonable time, were not binding upon him; for the bill of lading was to be read subject to the terms of the charterparty, and that the meaning of the parties was to be gathered from the two documents. The plaintiff disputed this view. We do not think it necessary to determine which of these contentions is correct, for the plaintiff further contended that under the circumstances of this case, he was entitled to succeed, because the charterparty did not vary the implied contract contained in the bill of lading, and we are of that opinion. The implied contract is that the ship shall be discharged within a reasonable time, and the charterparty stipulates that the custom of the port shall be observed. The jury have found that there was no custom, and therefore, even under the charterparty, reasonable dispatch should be used. The defendant, in any point of view, committed a breach of the contract for shipment, when the plaintiff's vessel was detained for more than a reasonable time. It was also contended that the defendant, at the time of discharge, was not a consignee within the Bills of Lading Act, 1855, because he had parted with the beneficial interest in the cargo. He had sold the goods, the property in which had ultimately rested in Gibbs & Co.; but I think the facts fall within the provisions of the statute. As against the plaintiff, the defendant retained all the rights of owner; he gave a delivery order for the cargo, by force of which the cargo was obtained by Gibbs. I think he was a consignee within the meaning of the Bills of Lading Act, 1855.

Judgment affirmed.

Solicitors for plaintiff: *Stibbard & Cronshay.*
Solicitors for defendant: *A. Crump & Son.*

THE QUEEN ON THE PROSECUTION OF HINTON, APPELLANT; THE SWINDON NEW TOWN LOCAL BOARD, RESPONDENTS.

1879
April 2.

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257—*Expense of sewering and paving Street—Liability of Owner of Premises—Change of Ownership before completion of Works—Owner "in default."*

Under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150, which enables the urban authority to give notice to the owners of premises abutting upon a street (not being a highway repairable by the inhabitants at large), to sewer, level, and pave it, and upon default to execute the works and recover the expenses from the owners in default, according to the frontage of their respective premises, such expenses cannot be recovered from any one who, though the owner of premises when notice was first given by the urban authority, has ceased to be owner before the completion of the works.

Upon appeal to the Wiltshire Sessions against an order of justices for the payment by the appellant of 27*l.* 19*s.* 4*d.*, being the amount of certain expenses incurred by the respondents under the Public Health Act, 1875 (1); the sessions quashed the order subject to a case, of which the following is the material part.

(1) 38 & 39 Vict. c. 55, s. 150. Where any street within any urban district (not being a highway repairable by the inhabitants at large) or the carriageway, footway, or any other part of such street, is not sewered, levelled, paved, metalled, flagged, channelled, and made good, or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adadjoining, or abutting on such parts thereof as may require to be sewered, levelled, paved, metalled, flagged, or channelled, or to be lighted, require them to sewer, level, pave, metal, flag, channel, or make good, or to provide proper means for lighting the same within a time to be specified in such notice. . . . If such notice is not complied with the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing, from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority or (in case of dispute), by arbitration in manner provided by this Act; or the urban authority may, by order declare the expenses so incurred to be private improvement expenses.

Sect. 257. Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered together with interest at a rate not exceeding five pounds per centum per annum from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the

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The respondents, who were the urban sanitary authority of Swindon New Town, on the 22nd of March, 1875, gave the appellant notice that his premises fronted upon part of a street which was not levelled, channelled, kerbed, sewered, and lighted to their satisfaction, and requiring him to execute the necessary works within twenty-eight days. Upon his default, the board made an agreement with a contractor for the completion of the works, but the whole were not completed till the 16th of May, 1876. On the 21st of June, the appellant received notice that the amount of the expenses had been apportioned between him and the owners of the adjoining premises according to the frontage, and stating the proportion payable by him, and on the 13th of December he received notice of demand of the amount, after which the order appealed against was made. It appeared that at the time when the works were completed, the appellant was not the owner of the premises nor the person receiving the rent for them, one Deacon, having purchased them from him, and having since May, 1876, been rated in respect of them.

J. W. Mellor, Q.C. (*G. P. Goldney*, with him), for the appellant. There is no liability to the expenses in question until the works are completed and demand made. The demand is to be made upon the person who is at the time owner of the premises, that is the person who derives benefit from the works in respect of which the payment is required.

[He was then stopped.]

A. Charles, Q.C. (*Ravenhill*, with him), for the respondents. The argument as to benefit is inapplicable, inasmuch as the owner who disposes of the premises obtains a larger price for them on account of the improvements which are in progress. "Owner in default," must be taken to mean the owner who has failed to comply with the notice. The succeeding owner has not failed to comply with it.

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works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred. In all summary proceedings by a local authority for the recovery of expenses incurred by them in works of private improvement, the time within such proceedings may be taken shall be reckoned from the date of the service of notice of demand.

It is to be observed that the Public Health Act, 1875, is merely a re-enactment of two previous Acts, 11 & 12 Vict. c. 63, and 21 & 22 Vict. c. 98. The first Act, 11 & 12 Vict. c. 63, contains in s. 69, a precisely similar provision as that in s. 150, of the Public Health Act, 1875. But it is clear that under the earlier Act, "owner in default," did not mean owner when the works where completed, for subsequently, in 21 & 22 Vict. c. 98, s. 62, a provision identical with that in s. 257, of the Act of 1875, is inserted, making the owner, when the works are completed, liable, which, if the appellant's construction is correct, was wholly unnecessary. The legislature intended that there should be a cumulative remedy against the past and the present owner, as under the Metropolis Management Acts, which are in pari materia: The *Vestry of Bermondsey v. Ramsey.* (1)

Mellor, Q.C., in reply.

COCKBURN, C.J. I think there cannot be the slightest doubt that common sense and justice require that, where the person to whom the notice was given—the then owner of the premises—has adopted the alternative which the statute gives him of leaving the local authority to do the work instead of doing it himself, and has afterwards ceased to be the owner, he cannot under the 150th section be deemed to be an "owner in default," at the time when the money becomes due to the local authority by reason of the work having been executed. The 257th section, which at first seemed to me to throw a difficulty in the way of Mr. Mellor's argument, I think may be brought in to supplement what would otherwise be a different state of things if the 150th section stood alone. We have the words "owner in default," that is to say, the person who as owner is required to do the work, and is in default by reason of not having done it, but it must be a person who continues to be owner at the time the work is completed, and when the money laid out upon it is demanded from him. I cannot think it was ever intended by the legislature that when the owner has parted with his property, and somebody else is in possession of it, and therefore getting the benefit of the work done, and who ought therefore to pay the expenses incurred; it should be competent for

(1) Law Rep. 6 C. P. 247.

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the local authority to follow him up wherever he may have gone, and hold him personally liable. I think that defect is remedied by the 257th section, which treats owners upon whom notice was originally served, and who are the owners at the time the work is completed, and the expenses demanded, as the persons upon whom the local board shall be able to come for the expenses. I cannot suppose it was intended that both should be liable—the owner who made default originally in not doing the work, and the owner who is the person who has become the owner at the time the work is completed. What was meant was this; if the owner who is called upon to do the work and who makes default in doing it, continues the owner at the time the work is executed and when the money laid out upon it is demanded, then he is liable under the 150th section, but if in the meantime he has ceased to be owner, he cannot be said to be the owner in default at the time the money is demanded, and when another has stepped into his shoes and become the owner. I think that in that way the different provisions relating to this work and the payment for it may be brought into harmony, and as I said before, common sense and justice will be sufficiently satisfied, because the person who gets the permanent benefit of the work will be called upon, as he ought to be called upon, to contribute towards the expenses that are incurred upon the work.

MELLOR, J., concurred.

Order confirmed.

Solicitors for appellant: *Clarke, Woodcock, & Ryland.*
Solicitor for respondents: *W. Moon, for Townsend.*

THE QUEEN ON THE PROSECUTION OF THE ASSESSMENT COMMITTEE OF ST. MARY, ISLINGTON, RESPONDENTS; THE GOVERNOR AND COMPANY OF THE NEW RIVER, APPELLANTS.

1879
April 2.

11 QBD 726
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Valuation Metropolis Act, 1869 (32 & 33 *Vict.* c. 67), *ss.* 46, 47—*Supplemental Valuation List—Alterations—Waterworks Company—Increase in Value of Mains by connection with newly-built Houses.*

Where under the Valuation of Property (Metropolis) Act (32 & 33 Vict. c. 67), s. 43, the mains and pipes of a waterworks company have been inserted in the quinquennial valuation list, a supplemental valuation list under ss. 46, 47 may be made during such period of five years, so as to include an increase in the value of the same mains by reason of their having been connected with newly-built houses since the date of the last valuation.

ON appeal by the Governor and Company of the New River against a supplemental valuation list for the parish of St. Mary, Islington, the sessions ordered the list to be altered by reducing the gross value of the company's property in the parish from 23,250*l.* to 22,612*l.*, and the rateable value from 20,700*l.* to 20,100*l.*, subject to a case.

1. In 1875, pursuant to the Valuation of Property (Metropolis) Act, 1869 (1), the overseers of the parish of Saint Mary, Islington,

(1) 32 & 33 Vict. c. 67, which makes provision for valuation lists in the Metropolis.

By s. 43. The valuation list as approved by the assessment committee shall come into force at the beginning of the year commencing on the 6th of April succeeding that to which it is made, and shall last for five years subject to any alterations that may be made by any supplemental or provisional list as hereinafter mentioned.

S. 46. Every valuation list shall be revised in manner directed by this Act, and such revision in every period of five years shall be conducted as follows:—

(1) In each of the first four years of such period a supplemental list shall, if necessary, be made out in the same form as the valuation list, and shall shew all the alterations which have taken place during the preceding twelve months in any of the matters stated in the valuation list, but shall contain only the hereditaments affected by such alterations.

(2) In the fifth year of every such period the overseers shall make a new valuation list.

S. 47. If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect:—

(1) The overseers of the parish in which such hereditament is situate may .... send to the assessment committee a provisional list containing the gross and rateable value as so increased or reduced of such hereditament.

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duly made their second quinquennial valuation list, in which the land occupied by the water-mains, pipes, and reservoirs of the New River Company in the parish was assessed at 22,500*l.* gross, and 20,000*l.* rateable value.

2. That list came into operation on the 6th of April, 1876, and the company have since paid the rates in conformity with such list.

3. Between the 6th of April, 1876, and the 6th of April, 1877, certain lengths of new mains had been laid by the company.

4. Between the 6th of April, 1876, and the 6th of April, 1877, a number of new houses had been built, many of which had in that interval been connected by means of service pipes with mains in existence prior to the 6th of April, 1876.

5. The service pipes from the mains to the houses belong to the owners or occupiers of the houses.

6. All houses in the parish of Islington are supplied with water by the New River Company, which is empowered by Act of Parliament to charge the occupiers at the rate of 4*l.* per cent. upon the annual value of the respective houses.

7. A large number of new houses are built and connected with the mains every year within the parish.

8. In February, 1877, the overseers made, pursuant to s. 47 of the Act, a provisional valuation list, containing the gross and rateable value of the company's property as increased in value, being 23,250*l.* gross, and 20,700*l.* rateable.

9. The company objected to such provisional valuation list, but the assessment committee confirmed it.

10. On the 31st of May, 1877, the supplemental valuation list now in dispute was made and deposited by the overseers pursuant to s. 46, and in it was embodied the provisional valuation list referred to.

11. The company also objected to the supplemental list, which objection was, however, disallowed, and the list finally approved by the committee.

12. The company's property as described in the supplemental list, consists of water-pipes, mains, and reservoirs, valued at 23,250*l.* gross, and 20,700*l.* rateable value.

13. These figures shew an increase of 750*l.* upon the gross, and of 700*l.* on the rateable value.

14. A portion of this increase, viz., 112*l.* gross, and 100*l.* rateable value, relates to the rating of the land occupied by the new mains, and is not now in dispute.

15. The remainder represents the increased value of the water-mains, pipes, and reservoirs derived from the connection of the mains existing prior to the 6th of April, 1876, with houses built between the 6th of April, 1876, and the 6th of April, 1877.

16. [It was arranged that the sessions should not be asked to settle the amount of assessment, but simply the basis upon which such amount should be calculated.]

17. The company contend that they are not liable to have their assessment increased by reason of the increase of their gross receipts in the parish, arising from the additional water-rentals derived from the connection of new houses with mains which were in existence prior to the year which the supplemental list of 1877 was made to cover, and that the mains being in existence before the 6th of April, 1876, the assessment of the company could not be increased by reason of such mains being made to supply additional houses between the 6th of April, 1876, and the 6th of April, 1877.

The sessions decided in favour of the company, and reduced the supplemental valuation list as before mentioned.

The question for the opinion of the Court is, whether the increase in the value of the company's property, by reason of the increase in the gross receipts derived from the new connections mentioned in paragraph 4, is such an increase as is within ss. 46 and 47 of the Act.

A. Wills, Q.C. (*Poland,* with him), for the respondents, after referring to ss. 46, 47, was stopped.

R. E. Webster, Q.C. (*Harmsworth,* with him), for the appellants. The mains in question having been once valued and inserted in the quinquennial list, there was no power to re-value them in each year of the period of five years. In 1875, when the quinquennial list was made, the valuer ought to have taken into account the probability that they would be connected with new pipes during the quinquennial period. The valuation is to be in force for five years. The words of s. 47, which are "if in any year the value of

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any hereditament is increased by the addition thereto or erection thereon of any building, &c.," apply to a case like the structural alteration of a house. Here the land occupied by the mains remains as it did before. It might happen that the same service pipe would produce a higher rent, owing to other floors in the same building becoming occupied, but it could not have been meant that there should be each year an inquiry as to the quantity of water which passed through the pipes. All probable fluctuations in value by reason of houses becoming unoccupied, or other facts causing a variation in the quantity of water supplied, should be considered in the quinquennial valuation.

COCKBURN, C.J. We need not trouble the counsel for the respondents. Our attention has been drawn to inconveniences which would result from a literal construction of s. 46, but I do not think we are at liberty to speculate upon the possible consequences of so applying it. It provides in plain intelligible language that in each of the first four years of the quinquennial period a supplemental list shall, if necessary, be made out in the same form as the valuation list. This supplemental list is to shew all the alterations which have taken place during the preceding twelve months in any of the matters stated in the valuation list. Now, the matters stated in the valuation list (that is, the quinquennial list) include, amongst others, the gross and the rateable value. If, therefore, any alteration has taken place in any year of the quinquennial period in the gross or rateable value, that is to be the subject-matter of this supplemental list. The provision of the Act is very plain, and more intelligible than statutory enactments usually are. I cannot help thinking that it was intended to rectify what might otherwise work very unjustly—a valuation to extend for a period of five years without any opportunity of amending it if it ceased to be in harmony with the actual facts. If by any extraordinary and unlooked for circumstances the value of the given property should be greatly increased on the one hand, or greatly decreased on the other, then the assessment ought not to continue to exist and taxes to be levied upon such an altered state of circumstances. It is possible, as has been argued, that the valuer might be in a position of

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difficulty if he had to enter into the minute question of whether some house had ceased to take its water supply from the main or had anything added to it; but I think the good sense of those who have to deal with this matter would make them not go into very minute inquiries. It is only where substantial alterations have taken place, which really do make all the difference to the individual who is to be assessed on the one hand, or to the parish which is to have the benefit of the tax on the other, that an inquiry should be directed. At any rate, the words of s. 46 are positive, requiring the supplemental list to be made every year, where there have been any alterations in the matters which are stated and which form the subject of the quinquennial list.

MELLOR, J. I am of the same opinion. I can see no use for s. 46, unless it bears the construction put upon it by my Lord.

Order of Sessions quashed; supplemental valuation list affirmed.

Solicitors for appellants: *Layton & Jaques.*
Solicitors for respondents: *Thompson & Debenhams.*

THE PHARMACEUTICAL SOCIETY OF GREAT BRITAIN *v.* THE LONDON AND PROVINCIAL SUPPLY ASSOCIATION, LIMITED.

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April 25.

Pharmacy Act, 1868 (31 & 32 *Vict. c.* 121) ss. 1, 15—*Corporation acting as Chemist and Druggist—Liability to Penalties—"Person."*

In sects. 1, 15 of the Pharmacy Act, 1868 (31 & 32 Vict. c. 121)—which prohibit under a penalty any person, not being a duly registered pharmaceutical chemist, &c., from keeping open shop for the sale of poisons or using the name of chemist or druggist . . .—the word "person" includes a corporation, and the penalty may be recovered from an incorporated company for keeping a chemist's shop as described in the Act, although the business of such shop is managed by duly registered chemists as servants of the company.

APPEAL by the plaintiffs from the decision of the judge of the Bloomsbury County Court in an action for a penalty under 31 & 32 Vict. c. 121. The facts are fully stated in the judgment of Cockburn, C.J.

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March 5; April 5. *Sir J. Holker, A.G.* (*Lumley Smith,* with him), for the plaintiffs. The fact that the defendants are a corporation does not exclude them from the operation of the Act. The word "person," in ss. 1, 15, ought to have its natural legal meaning, which includes "corporation": 2 Inst. p. 722. And although in some Acts of Parliament the interpretation clause expressly makes the word "person" include corporation, this does not prove that primâ facie the word would not have the same meaning, the clause being usually inserted to leave no room for doubt. The mischief which the Act meant to provide against was the selling of poison by unqualified persons, but to exclude corporations from its restrictions will prevent it from having full effect.

A. Wills, Q.C. (*Finlay,* with him), for the defendants. There is no ground for inferring that the legislature, by 31 & 32 Vict. c. 121, intended to prevent a corporation from carrying on the business of chemists and druggists; Apothecaries Hall and other corporations having always carried on such business. The word "person" does not primâ facie include a corporation. If the legislature had meant to include corporations within the scope of the Act, they would have made special provisions with regard to them, whereas under the plaintiff's construction corporations will be prevented from carrying on the business of chemists and druggists altogether. He referred to 7 & 8 Geo. 4, c. 28, s. 14.

Lumley Smith, in reply.

Cur. adv. vult.

April 25. The following judgments were delivered.

COCKBURN, C.J. This was an appeal from the decision of the judge of the Bloomsbury County Court, in favour of the defendants, in an action brought in that court by the plaintiffs to recover from the defendants a penalty under 31 & 32 Vict. c. 121, for having sold poisons, and kept an open shop for the sale of poisons in contravention of that Act.

By the 1st section of the statute it is enacted that, "It shall be unlawful for any person to sell or keep open shop for retailing, dispensing, or compounding poisons, or to assume or use the title chemist and druggist, or chemist or druggist, or pharmacist, or dispensing chemist, or druggist, in any part of Great Britain,

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unless such person shall be a pharmaceutical chemist, or a chemist and druggist within the meaning of this Act, and be registered under this Act." And by the 15th section, "any person who shall sell or keep an open shop for the retailing, dispensing, or compounding poisons, or who shall take, use, or exhibit the name or title of chemist and druggist, or chemist or druggist, not being a duly registered pharmaceutical chemist, or chemist or druggist, or who shall take, use, or exhibit, the name or title of pharmaceutical chemist, pharmaceutist, or pharmacist, not being a pharmaceutical chemist, shall for every such offence be liable to pay a penalty or sum of five pounds, and the same may be sued for, recovered, and dealt with, in the manner provided by the Pharmacy Act for the recovery of penalties under that Act." By the Pharmacy Act (15 & 16 Vict. c. 56), s. 12, the penalty recoverable under that Act is to be recovered in England or Wales "by plaint under the provisions of any Act in force for the more easy recovery of small debts and demands."

The defendants are a company registered under the Companies Act, 1862 and 1867, as a limited company, with a nominal capital of 10,000*l.*, divided into 1000 shares of 10*l.* each. Of these, one William Mackness holds 564 shares fully paid up. Six persons (one of whom was Henry Edward Longmore) hold five shares, with 2*l.* 10*s.* paid on each share. Three persons hold one share each, with 2*l.* 10*s.* paid on each share; the remaining shares are unallotted.

The defendants' company was registered on the 29th of January, 1878, and was formed "to purchase or acquire the trade or business of a wholesale and retail grocer and general warehouseman," then carried on by William Mackness at 113, Tottenham Court Road. Mackness is the managing director of the company. He is not a duly registered pharmaceutical chemist, or chemist and druggist, within the meaning of the Pharmacy Act, 1868. Henry Edward Longmore is a pharmaceutical chemist, or chemist and druggist, with the meaning of the Act, but no other shareholder is so.

The business of the company is carried on, as that of Mackness was before the company was formed, at 113, Tottenham Court Road, and includes, amongst other departments for the sale of

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various goods, a chemist's and druggist's shop or drug department, which is an open shop for the retailing, dispensing, and compounding poisons, within the meaning of the Pharmacy Act, 1868.

Longmore, as has been stated, is, and at the time of the sale of the poisons in question was, a duly registered chemist and druggist within the Pharmacy Act, 1868, and the business of the drug department was conducted by him with the aid of two qualified assistants. He, with the two assistants, attended regularly to the drug department, and to nothing else. He and his assistants were the servants of the company, and were paid by salary or wages.

Upon this state of facts, the question presents itself whether the defendants' company as such, is amenable to the penal enactments of the statute. It was fully admitted on the argument, nor could it be contested, that if this had been an ordinary partnership, the individual partners—at all events, such of them as were not qualified under the statute—would have incurred the penalties it imposes. The intention of the legislature appears clearly to have been to prevent any shop or establishment to exist for the sale of poisons, except under the immediate superintendence and control of a duly qualified proprietor. It is not enough that the proprietor employs a qualified person to manage the business. The master must himself be duly qualified. Two parties could not combine to carry on the joint business of grocer and chemist, though the one attending to the latter department of the business might be a qualified chemist. There would be nothing to insure in such a case that in the absence of the qualified partner, the other might not take upon himself to act in his stead, and thus the security against future mistakes in the dispensation of medicines, which the statute was intended to insure, might be seriously compromised.

The defendants are therefore within the scope of this legislation. The case comes within the evil against which the statute was intended to provide a remedy. But they are said not to be within the statute as being an incorporated company; the main ground on which this contention rests being that the Act in question, in its prohibitory as well as penal clauses, uses the term "person," a term which it is contended cannot be properly applied to a corporate body.

The objection thus founded on the use of the word "person" in the penal clauses of the Act would seem at first sight, to present some difficulty; but, when the scope and purpose of this legislation are taken into account, the difficulty does not appear to be insuperable.

Reliance was placed by the Attorney General in his argument, in support of the appeal, on the enactment of the 14th section of 7 & 8 Geo. 4, c. 28, that whenever any statute relating to any offence whether punishable by indictment or summary conviction, in describing the offence or the offender uses words importing the singular number or the masculine gender only, it shall be understood to include several matters as well as one matter, several persons as well as one person, males as well as females, and bodies corporate as well as individuals, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction. But that Act is expressly confined to proceedings on indictment or summary conviction, and therefore cannot apply here, where the proceeding is by civil action. It shews no doubt, the disposition of the legislature to include corporations under the general designation of "person" or "individual" in penal statutes. But the terms of the Act will not admit of its application to the present case.

To solve the question we must therefore confine our attention to the statute itself on which this action is brought. That an incorporated company is within the mischief against which the legislation was directed is, I cannot help thinking, quite obvious. If a company, by reason of its being incorporated, is not within the provisions of the Act and amenable to its penalties, and effect is to be given to the argument of Mr. Wills, it necessarily follows that such a company might openly carry on the business of chemists and druggists, and sell poisons, without a single member of the company, or even the person employed to conduct this portion of their business, being qualified. The person actually selling the poisons might be amenable—and it was probably with a view to avoid this that in the present instance a qualified person was employed to manage this department of the defendants' business—but the company employing him would enjoy complete immunity. A person desiring to combine the business

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of a chemist and druggist with that of a grocer would have only to get one or two persons to join him, providing them with a share or two, as appears to have been done in the formation of this company, and so forming an incorporated company, to set the statute at defiance. It cannot be supposed that the legislature can have contemplated a result so entirely at variance with the policy and purpose of the Act, or intended to place incorporated companies on a different footing in this respect from that of ordinary partnerships or individuals.

It is no doubt possible that, although joint stock companies existed at the time this statute was passed, the formation of such companies for the purpose of combining trades hitherto carried on singly—and among other things for that of superadding the business of the chemist to that of the grocer or provision merchant—may not have been present to the minds of those who framed and passed this statute. Still, if the case, although unforeseen, is within the mischief which the legislature had in view, and the enactment is large enough to embrace it without any forced or strained construction being put on the language of the Act, it is our duty to advance the remedy intended to be afforded.

It is true that the term used in the 1st section of the Act is "person," and that, ordinarily speaking, this word would not be applicable to a corporation. But when the meaning and effect of the enactment is looked at without too close an adherence to its precise phraseology, it amounts to no less than a general prohibition to every one not qualified according to the Act from dealing in poisons or carrying on the business of a chemist and druggist. The fallacy of the argument urged on behalf of the defendants is that it assumes that the prohibition is addressed to individual persons. But the provision, being universal, must extend to all persons, whether acting in an individual or corporate capacity. The defendants, it is true, in thus infringing the law, are not acting in their individual capacity, and may not—but on this it is unnecessary to pronounce any opinion—be liable individually. But in their aggregate or corporate capacity they are breaking the law; and, being in the latter capacity, as well as individually, within the prohibition, they must, if capable of being sued for it, be also amenable to the penalty, and must, for this

purpose, be taken to be sufficiently persons within the meaning of the statute. The fact so strenuously insisted on by Mr. Wills, that in other sections of the Act the word "person" is applicable to individual persons only, and not to a corporate body, only tends to shew that the adoption of the business of chemists and druggists by incorporated companies like the present was not contemplated when the Act was passed. It by no means shews that—the prohibition being general, and the mischief clearly within the statute, the company, though as such they may be incapable of complying with some of its requirements—as, for instance, to undergo examinations under s. 6—ought not to be held to be within the penal clauses of the Act, or should be allowed openly to break the law under the belief that they are beyond its reach.

In the present case, it so happens that a member of the company, and who manages the chemical department of its business, Mr. Henry Edward Longmore, is a qualified chemist. But it is not as a member of the company that he so acts, but as the paid servant of the company. It is clear, therefore, that his being qualified will not exonerate the other members of the company who are not so. Nor would it be otherwise even if it were as a member of the company that he so acted. So long as any of the company are disqualified, the body is disqualified; and the one who, though himself qualified, acts for the body becomes a party to their offence, and becomes liable conjointly with them. The qualified chemist who, in partnership with a grocer, carried on the business of grocer and chemist, would be as liable to the statutory penalty, as his unqualified partner.

The county court judge was therefore wrong in holding that, because the chemical department of the defendants' business was managed by a qualified person, the defendants were not liable to the penalty.

Being thus of opinion that a company though incorporated is none the less within the prohibition of the statute, I come to the remaining question whether such a company is capable of being sued for the penalty provided by the 15th section.

Upon this point the authorities referred to by the Attorney General in his argument appears to me to afford a satisfactory answer. Although it is true that a corporation cannot be indicted

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for treason or felony, it was established by the case of *Reg.* v. *Birmingham and Gloucester Railway Company* (1), that an incorporated company might be indicted for nonfeasance in omitting to perform a duty imposed by the statute—such as that of making arches to connect lands severed by the defendants' railway. It was further held in *Reg.* v. *Great North of England Railway Company* (2), that an incorporated company could be indicted for misfeasance—as in cutting through and obstructing a highway though they could not be indicted for treason, or felony, or offences against the person.

In the present instance we are dealing not with an indictment or information but with an action in a civil court. Though the sum to be recovered is no doubt a penalty for the infraction of the statute, the means to be resorted to for its recovery are of a purely civil character.

If a corporation can be indicted for misfeasance, I am wholly at a loss to see why it may not be proceeded against in a civil suit for the recovery of a penalty which it has incurred by disobedience of a statutory prohibition.

I am therefore of opinion that this appeal must be allowed, the decision of the late judge of the county court reversed, and judgment entered for the plaintiffs.

MELLOR, J. I have come with considerable hesitation to the conclusion that our judgment should be for the plaintiffs, and that both questions submitted to us must be answered in their favour.

I was for some time inclined to think that the circumstances of the defendants' case were not within the contemplation of parliament when the Pharmacy Act, 1868, was passed, and that, although clearly within the mischief intended to be provided against, words sufficiently comprehensive had not been used in framing the Act to include the acts of the defendants, and that consequently it became a casus omissus. A fuller consideration of the provisions of the Act, 31 & 32 Vict. c. 121, has however, brought me to the same conclusion as that expressed by my Lord Chief Justice in his judgment in this case.

I think that the great object of the legislature was to prevent

(1) 3 Q. B. 223. (2) 9 Q. B. 315.

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the sale of poisonous or dangerous drugs by persons not qualified by skill or experience to deal in such commodities. It therefore proposed to form into one association all persons who for the future should alone be deemed qualified to deal in the same, and who should be registered under the provisions of the Act which we are now considering. It accordingly provided for the interests of all chemists and druggists who had been in business as such previously to the passing of the Act, but with regard to the future, it made careful provision for the examination and registration of all persons who should in future form the only qualified body of persons who should be permitted to keep open shop for the retailing or compounding of poisons; and I now think that the sections which mainly embarrassed me as to the extent of the prohibitive sections, are really when carefully considered only the provisions regulating the steps which in future are to be taken by all persons who desire to obtain the privilege of keeping open shop, and retailing, dispensing, or compounding the poisonous drugs in question, and who, upon being registered as pharmaceutical chemists or chemists and druggists within the provisions of the Act, will become qualified so to do. To incorporate such a society to whose members in future the sole privilege, of keeping open shop as chemists or chemists and druggists for the sale or dispensing or compounding poisons, should be intrusted, rendered it necessary to prohibit all other persons, not so registered or qualified, from keeping open shop or retailing, dispensing, or compounding such drugs for sale, and from assuming the title of pharmaceutical chemist, or chemist and druggist; and therefore, whilst one set of sections are qualifying and intended to regulate for the future the mode in which persons should become qualified as members of the association, and to provide for the government of the body incorporated, the sections 1 and 15 of the Act, which contain the prohibitory words upon the meaning of which we have to decide, have an entirely distinct effect. The object of those sections is absolutely to prevent the danger assumed to be likely to arise to the public, by the keeping open shop for the retailing, dispensing, or compounding poisons by any persons not being qualified pharmaceutical chemists, or chemists and druggists, and the intention and scope

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of those sections, and the general object of the Act, is absolutely to exclude, from the time of the passing of the Act, all persons other than the registered members of the Pharmaceutical Society from keeping open shop or retailing, dispensing, or compounding of poisons.

Now, before the passing of the Act of 1868, all persons whether "natural persons" or "artificial persons" constituted by incorporation for trading purposes, might either as individuals or as corporations, have kept open shop and retailed, dispensed, or compounded poisons. It was essential, therefore, to the effectuating the objects of the Act, that all persons whether natural or artificial should for the future be prevented from dealing as before in the prohibited matters, and the cases cited by the Attorney General in his argument, shew that an incorporated company may commit an offence either of nonfeazance or misfeazance, and may be punished by indictment for the same, as if the act had been done by a natural person. We may well, therefore, interpret the word "person" in the 1st and 15th sections so as to include not only any natural person, but any artificial person created by the law, which would be capable of committing the offence referred to in the 15th section, as having committed it by the course of proceeding actually adopted by the defendants, and we are authorized upon the principle of decided cases to say not only that the "offence" has been committed by the defendants, but that they are liable to be punished for it under the provisions of the 15th section.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Flux & Co.*
Solicitors for defendants: *Crouch & Spencer.*

THE QUEEN ON THE PROSECUTION OF THE GUARDIANS OF TADCASTER UNION, RESPONDENTS; *v.* THE GUARDIANS OF LEEDS UNION, APPELLANTS.

1879
May 7.

Poor Law—Divided Parishes Act (39 & 40 *Vict. c.* 61), *s.* 34—*Settlement by Residence—Child under Seven.*

The pauper was the illegitimate child of C. W., a single woman, and was born in the parish of R. When the child was about a fortnight old it was placed by its mother in the care of J. O. and his wife, who resided with it for the term of six years in the parish of S.:—

Held, that under 39 & 40 Vict. c. 61, s. 34, which enacts that "where any person shall have resided for the term of three years in any parish in such manner and under such circumstances as would, in accordance with the statutes in that behalf, render him irremoveable, he shall be deemed to be settled therein," &c., the sessions were justified in finding that the pauper was settled in S.

UPON appeal to the sessions for the West Riding of York against an order of removal adjudging the place of the last legal settlement of Beatrice Emily Wright, aged eight years, the illegitimate child of Caroline Wright, to be in the parish or township of Seacroft, in the appellants' union, the order was confirmed subject to a case.

1. The pauper Beatrice E. Wright is the illegitimate child of Caroline Wright, and was born in the parish or township of Roundhay, in the West Riding, in May, 1870.

2. When the pauper was about a fortnight old she was placed by her mother in the care of John Oakes and his wife.

3. John Oakes and his wife resided at Seacroft from December, 1871, to February, 1878, and during all the time the pauper lived with them without receiving any relief, except that in September, 1875, the pauper was sent by John Oakes for one week (during the temporary illness of his own daughter) to the house of his son, who lived at Cross Gates, in the West Riding.

4. At the time the pauper was so sent to Cross Gates both John Oakes and his wife intended to bring her back to their house at Seacroft within a period of a week or thereabouts.

5. In February, 1878, John Oakes and his wife with the pauper left Seacroft, and went to reside in Cross Gates within the respondents' union; and in September, 1878, the pauper became chargeable to the respondents' union.

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6. No evidence was given of the settlement by birth or otherwise of Caroline Wright, the mother of the pauper, though evidence was given that the respondents had made unsuccessful inquiries about it.

7. During all the time aforesaid the parishes or townships of Seacroft and Roundhay were comprised within the appellants' union.

The question for the Court is whether the order of sessions was right.

Lofthouse, for the respondents, after referring to 39 & 40 Vict. c. 61, s. 34 (1), was stopped.

Poland and *Lumley,* for the appellants. A child under seven, the age of nurture, like the pauper, is incapable of "residing" so as to acquire a settlement within the meaning of s. 34. To "reside," there must be a person capable of selecting a residence as a voluntary act. Under 9 & 10 Vict. c. 66, it has been held that a child, placed by its parents at a school in a parish different from that in which they live, continues constructively to reside with them, and to share their status of irremoveability: *Reg.* v. *Abingdon.* (2) The mother is legally responsible for the support of the child, and it must be taken to reside with her. If children under seven can acquire a settlement by themselves under s. 34, it will cause them to be separated from their parents. Again, the residence under s. 34 is such a residence as would, under the statutes relating to irremoveability, have made the pauper irremoveable; but upon reference to the proviso in 9 & 10 Vict. c. 66, s. 1, and 11 & 12 Vict. c. 111, s. 1, it will be seen that it provides that a wife or children should only be irremoveable from a parish from which the husband or parent would be irremoveable. Here the mother would not have been irremoveable from Seacroft.

COCKBURN, C.J. I think our judgment must be for the respondents. It has been argued that the proviso in 9 & 10 Vict.

(1) 39 & 40 Vict. c. 61, s. 34, enacts that "where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years as would, in accordance with the statutes in that behalf, render him irremoveable, he shall be deemed to be settled therein," &c.

(2) Law Rep. 5 Q. B. 406.

c. 66, s. 1 (as explained in 11 & 12 Vict. c. 111, s. 1), goes to shew that a child is irremoveable only where the parent is irremoveable, and that therefore the three years' residence under 39 & 40 Vict. c. 61, s. 34, ought not to give it a settlement distinct from that of its mother. But the proviso in question has really nothing to do with the case before us. It was enacted to prevent the dispersing of different members of a family. Here there is no question of separating the child from its parent, and we have simply to consider s. 34 by itself. This child has actually resided for three years in Seacroft, but it is contended that because the mother lived in another parish the child constructively resided with her, and where she resided. It is true that where a child is under the authority and control of its parent, it may, even when placed at a school in a different parish, be said to constructively reside with the parent. Here, however, the child had been entirely given up by its mother—it was not a suspension, but a virtual abandonment of the maternal right. Circumstanced as she was, she asked Oakes and his wife to take the child off her hands, and the child resided with them in another parish without any intention on the part of the mother to resume her rights. Mr. Poland has contended that under s. 34 there must be an intention on the part of the person residing to choose a residence, but nothing of the kind is expressed in the Act. The expression is simply "shall have resided." The child must have resided somewhere, and the words and spirit of the section are satisfied by actual residence on its part. The section may sometimes produce inconvenience, but on the whole its operation will be beneficial. The order must be confirmed.

LOPES, J. I am of the same opinion. The simple question is has the child "resided" in Seacombe for the prescribed period? The case is distinguishable from that of a child placed at a school, for here the mother relinquished the custody of it altogether.

Judgment for the respondents; order of Sessions confirmed.

Solicitor for appellants: *Rushworth.*
Solicitors for respondents: *Torr & Co.*

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May 8.

THE QUEEN *v.* THE JUSTICES OF WILTSHIRE.

Poor-Rate—Appeal—Valuation List—Objection made to List before making of Rate—Union Assessment Committee Act, 1862 (25 & 26 *Vict. c.* 103)—*Union Assessment Committee Amendment Act,* 1864 (27 & 28 *Vict. c.* 39), *s.* 1.

23 L.D. 502

By 27 & 28 Vict. c. 39, s. 1, it is enacted that no person shall be empowered to appeal to any sessions against a poor-rate made in conformity with the valuation list unless he shall have given the assessment committee notice of objection against the list and shall have failed to obtain such relief in the matter as he deems just.

An appellant who has given notice of objection to the valuation list and failed to obtain relief before a rate is made in conformity with the list is not bound by the above enactment to give a fresh notice of objection to the list after the rate is made in order to be entitled to appeal.

Application for a mandamus to the justices of Wiltshire to enter continuances and hear an appeal against a poor-rate for the parish of Stratton St. Margaret, in the Highworth and Swindon Union.

A supplemental valuation list for the parish had been deposited on the 13th of April, 1878. On the 11th of May the Great Western Railway Company (the appellants) had given to the assessment committee notice of objection to the list in respect of the amount at which their property was valued. On the 15th and 22nd of May meetings of the assessment committee were held for the purpose of hearing objections to the list, and on the latter day the committee, after hearing the appellants' objection, refused to alter the valuation of their property. A rate, based upon the list, was made on the 23rd, published on the 26th, and demanded on the 28th of May. The next subsequent meeting of the assessment committee was on the 12th of June, and the Midsummer sessions were on the 2nd of July. Twenty-one days' notice of appeal to the assessment committee being required there would not have been time, if the appellants were obliged to give a fresh notice of objection to the assessment committee and go before them again, to give the requisite notices of appeal for the Midsummer sessions. The appellants gave a second notice of objection to the list on the 31st of July, which objection the assessment committee heard, but again refused to alter the valuation.

appellants then gave notice of appeal to the Michaelmas sessions. The sessions refused to enter and respite the appeal, on the ground that the appellants were in a position to have appealed to the Midsummer sessions, and that therefore the appeal was too late, not being made to the next practicable sessions.

Webster, Q.C. (*Lopes*, with him), for the appellants, moved for a rule nisi for a mandamus. The appellants were bound by the 1st section of the Union Assessment Committee Amendment Act, 1864, to give notice of objection to the list, and apply for relief to the assessment committee after the making of the rate in order to be entitled to appeal. The decision in *Reg.* v. *Great Western Ry. Co.* (1) is conclusive of this case. The ground of the decision is that the assessment committee are entitled, after the rate is made, to have the option of amending the list and the rate before the rate is appealed against. He also cited *Reg.* v. *Justices of Derbyshire* (2); *Reg.* v. *Biggleswade.* (3)

Charles, Q.C., and *Ravenhill*, for the respondents, shewed cause in the first instance. It is sufficient if before the appeal there has been a notice of objection to the assessment committee. The notice need not be after the rate is made. It would be absurd that the appellants who had just before applied to the assessment committee for relief and failed should have to incur the trouble and expense of applying again. The case of *Reg.* v. *Great Western Ry. Co.* (1) is distinguishable. In that case there was a second rate made while an appeal was pending against the first rate, and it was held that before appealing against the second rate the appellants were bound to give a fresh notice of objection to the list. It may be that before there can be an appeal against the second rate the assessment committee must have a fresh option of amending the list and altering the rate in conformity with the amended list. But it does not follow that when there is only one rate in question, having given notice of objection to the list once, the appellants are bound after the rate is made to give a second notice of objection to the list.

Webster, Q.C., in reply.

(1) Law Rep. 4 Q. B. 323. (2) 25 L. T. 43.
(3) 21 L. T. 494.

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COCKBURN, C.J. I am of opinion that this rule should be refused. The question turns on the 1st section of the Union Assessment Committee Amendment Act. Under the Union Assessment Committee Act, 1862, a person could appeal against a rate founded upon the list approved by the Assessment Committee without having taken objection to the list. The amending Act provides that no person shall be empowered to appeal against a poor-rate made in conformity with the list unless he shall have given notice of objection against the list and shall have failed to obtain such relief in the matter as he deems just. This is no doubt to some extent a salutary provision. An opportunity is given of going before the Assessment Committee and objecting to the assessment in a summary and inexpensive manner, and so avoiding the expense connected with an appeal. But before the Amending Act it was left open to the party objecting to the assessment to appeal without previously having recourse to the more summary process.

The legislature have interfered and prevented an appeal to the sessions before recourse has been had to the cheaper and easier mode of seeking relief. The contention on the part of the applicants is, that though the party may have gone to the assessment committee and sought relief once, so soon as the rate is made he is bound to go again and re-open the same matter before he can appeal. It is impossible to suppose that the legislature can have intended such an absurd result. It is contended that we are bound by the decision in *Queen* v. *Great Western Ry. Co.* (1) There the Court held that, though the list stands good until a fresh one is made, with respect to each rate made upon such list a party intending to appeal must challenge the list afresh. I own that the discussion in the present case has somewhat shaken my confidence in the correctness of our decision in that case, but our decision in the present case does not overrule it, for the two cases are clearly distinguishable. It is conceivable that the legislature, though they meant the list to be permanent until a new one is made, may have provided that, before a party can appeal against each successive rate, he must in respect of each such rate have endeavoured to obtain relief in the cheap and summary mode pro-

(1) Law Rep. 4 Q. B. 323.

vided by taking objection to the list upon which such rate is based before the assessment committee. It seems to me, therefore, that without interfering with our former decision, we may say that at all events when a second rate is not in question, a party who has once objected to the list and failed to obtain relief is in a position to appeal. If this be so the appellants ought to have gone to the session in July and the ground of the present application fails.

LOPES, J., concurred.

Rule refused.

Solicitor for appellants: *R. R. Nelson.*
Solicitors for respondents: *Bradford & Foote.*

THE PRISON COMMISSIONERS *v.* THE CORPORATION OF LIVERPOOL. *May* 13.

Reformatory School, Expenses of providing Clothing requisite for a Prisoner's Admission to—Reformatory Schools Act, 1866 (29 & 30 *Vict. c.* 117), *s.* 23 —*Prison Act,* 1877 (40 & 41 *Vict. c.* 21), *s.* 4.

By the Prison Act, 1877, the "prison authority" is relieved from the obligation of defraying the expense of clothing requisite for the admission of a youthful offender to a reformatory school under the Reformatory Schools Act, 1866, s. 23, and such expense must be provided for under s. 4 of the Prison Act, 1877.

Affirmed on appeal (5 Q.B.D. 382 C.A.)

SPECIAL CASE.

The defendants were the prison authority of the Liverpool borough prison for the purposes of the 23rd section of 29 & 30 Vict. c. 117, down to the year 1877. On the 28th of March, 1879, a boy named Mulloch was convicted by the stipendiary magistrate for the borough of Liverpool of an offence and sentenced to be imprisoned for more than ten days, and then to be sent to the *Akbar* reformatory school ship, which was a duly certified reformatory school, for the period of five years. Mulloch was imprisoned in the borough prison in accordance with his sentence, and then removed to the reformatory ship. Under the Prison Act, 1877, the said prison was vested in one of her Majesty's principal secretaries of state, and during the whole period of Mulloch's imprisonment therein the superintendence of such prison was vested in the plaintiffs under the Prison Act, 1877,

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subject to the control of the said secretary of state. Mulloch was possessed of clothing sufficient for the purpose of his decent conveyance from the prison to the school, but for the purpose of his admission to the school he was provided by the plaintiffs with certain other clothing at the cost of 30*s*. Such other clothing was proper clothing for Mulloch requisite for his admission to the school, and unless provided with it he would not have been admitted to the school. It was agreed that the defendants should repay to the plaintiffs the 30*s*. the cost of the clothing so provided by them if the defendants were legally liable to provide the clothing.

The question for the Court was whether they were so liable.

Poland, for the plaintiffs. By the old Prison Act, 1865 (28 & 29 Vict. c. 126), the expenses of the maintenance of prisoners and their clothing was defrayed by the prison authority. By the Reformatory Schools Act, 1866 (29 & 30 Vict. c. 117), s. 28, a prison authority may contribute to the establishment and enlargement of certified reformatory schools. It is admitted that until the passing of the Prison Act, 1877 (40 & 41 Vict. c. 21), the defendants were the prison authority for the purposes of the Reformatory Schools Act, 1866. By the 23rd section of that Act it is provided that the expenses of proper clothing for the admission of a youthful offender to a reformatory school shall be defrayed by the prison authority within whose district he has been last imprisoned. The question is, therefore, whether the liability to defray the expense of providing such clothing has been transferred from the defendants to the plaintiffs by the Prison Act, 1877. It is submitted that it has not. The 4th section of that Act provides that all expenses of the maintenance of prisons and the prisoners therein shall be defrayed out of moneys to be provided by Parliament, and that the prisons to which the Act applies, and all powers and jurisdiction vested in or exerciseable by prison authorities or the justices in sessions assembled in relation to prisons or prisoners within their jurisdiction, shall be transferred to the secretary of state, but the old prison authorities are not abolished. The 57th section of the Act defines "maintenance of a prisoner" to mean all such necessary expenses incurred in respect of a prisoner for

food, clothing, custody, safe conduct, and removal from one place of confinement to another as would but for the Act have been payable by the prison authority. The Act does not, however, apply to reformatory schools: see s. 60, which defines "prison" for the purposes of the Act. The old prison authorities still exist for certain purposes, and they can still contribute to the establishment of reformatory schools under the Reformatory Schools Act, 1866. Sect. 52 expressly preserves the powers and jurisdiction of a prison authority in relation to reformatory schools. The expense in question is not a prison expense but a school expense.

[COCKBURN, C.J. By the Prison Act, 1865, the expenses of prisoners were to be borne by the prison authorities, and accordingly the expense of providing a prisoner with clothing for the purposes of his admission to a reformatory school were by the Reformatory Schools Act thrown upon the prison authority. But by the Prison Act, 1877, the prison authority is relieved of its obligation to defray the expenses of prisoners.]

It is contended that the expenses of providing clothing for the purpose of an offender's admission to a reformatory is not an expense incurred in respect of a prisoner "confined therein" under the 4th section of the Prison Act, 1877. The expenses contemplated by that section are the expenses of prisoners in a prison to which the Act applies, and there is nothing in the Act by which it is intended to interfere with reformatory schools, as is shewn by the 52nd section, which preserves the power and jurisdiction of the prison authority with regard to reformatory schools.

R. S. Wright, for the defendants, was not called upon.

BY THE COURT (Cockburn, C.J., and Mellor, J.). There must be judgment for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Hare & Fell, for the Solicitor to the Treasury.*

Solicitors for defendants: *F. Venn & Son, for J. Rayner.*

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May 15.

THE QUEEN ON THE PROSECUTION OF G. W. BETTS & CO. *v.* MILLEDGE AND OTHERS, JUSTICES OF WEYMOUTH.

Justices of the Peace—Interest Disqualifying—Public Health Act, 1875—*Town Council—Urban Sanitary Authority.*

Complaint having been made to the Local Government Board of a nuisance upon premises belonging to B., in the borough of W., the Board communicated with the Town Council of W., who were the urban sanitary authority under the Public Health Act, 1875, and required them to abate the nuisance. The council having made inquiries, passed a resolution that steps should be taken for the removal of the nuisance, and took out a summons against B. At the hearing an order for the abatement of the nuisance was made. Two justices who were present were members of the town council when the resolution was passed.

Held, that the councillors who were justices had such an interest as might give them a bias in the matter, that consequently they ought not to have sat as justices upon the hearing of the summons, and that a rule for a certiorari to quash the order must be made absolute.

RULE calling on J. Milledge, and J. E. Robens, and others, justices of the borough of Weymouth, to shew cause why a writ of certiorari should not issue to remove into this Court an order that G. W. Betts & Co. should abate a nuisance.

The ground of the rule was that one or more of the justices were interested in the matter of the order.

The following facts appeared on the affidavits. Complaint having been made to the local government board of a nuisance arising from a piece of water in which were certain timber pounds belonging to G. W. Betts & Co., the board communicated with the town council of Weymouth who were the urban sanitary authority for Weymouth and Melcombe Regis, under the Public Health Act, 1875, and required them to abate the nuisance. The town council instructed a medical man to examine and report upon the matter, and after receiving his report, passed a resolution that the necessary steps should be taken against Messrs. Betts & Co. for the removal of the nuisance, which it was suggested arose from their timber pounds. A summons was accordingly taken out upon which the order in question was made. Both Milledge and Robens were members of the council when the resolution was passed, and they denied by their affidavit that they had taken active part in the proceedings. By

the affidavits in support of the rule it was sworn that they had taken an active part in discussions on the same question. They were on the bench of justices when the summons came on for hearing, and the solicitors for the defendants objected to their sitting, on the ground that they were the prosecutors. The defence was that the nuisance was caused by the sanitary authority themselves sending the drainage of the town into the piece of water in question. The justices objected to refused to retire, and an order was made by a majority of four against two justices, the two objected to being two of the four.

G. Pitt-Lewis, shewed cause. The town council were compelled to take out the summons by the action of the local government board. Such of the council as were justices had, therefore, no possible bias with regard to the proceedings. By the Public Health Act, 1875, s. 258, no justice of the peace shall be deemed incapable of acting in cases arising under the Act by reason of his being a member of any local authority.

Channell, in support of the rule, was not heard.

COCKBURN, C.J. The mere fact that some of the council who passed resolutions for this prosecution were borough justices might have been no objection to the order, if these justices had not assisted at the hearing of the summons. But I cannot see how we can get over the fact of their presence when the order was made. They practically made an order in a case where they were prosecutors. The rule must be made absolute.

MELLOR, J., concurred.

Rule absolute.

Solicitors for applicants: *Combe & Wainwright.*
Solicitors for justices: *F. J. & G. J. Braikenridge.*

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May 15.

IN THE MATTER OF FOWLER *v.* THE MONMOUTHSHIRE RAILWAY AND CANAL COMPANY.

*Solicitor and Client—Uncertificated Solicitor—Costs—Not recoverable by Client against Opposite Party—*37 & 38 *Vict. c.* 68, *s.* 12.

Under the Attorneys and Solicitors Act, 1874 (37 & 38 Vict. c. 68), s. 12—which enacts that no costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as an attorney or solicitor without being duly qualified so to act shall be recoverable in any action, suit, or matter by any person or persons whomsoever—the successful party in a legal proceeding cannot, where the solicitor employed by him was uncertificated, recover his costs and disbursements from the party otherwise liable.

Rule calling on C. M. Smith, Esq., one of the masters of the Queen's Bench Division, to shew cause why a mandamus should not issue commanding him to tax the costs of E. Fowler in the matter of an arbitration between him and the Monmouthshire Railway and Canal Company.

It appeared upon affidavit that in December, 1874, land belonging to Fowler was required by the company under the provisions of the Lands Clauses Consolidation Acts as incorporated in their special Acts. The compensation claimed by Fowler having been ascertained by arbitration, an application was, on the 17th of July, 1878, made to the master on his behalf to tax his costs and disbursements incurred under the arbitration. It was thereupon objected by the company that one W. H. Lloyd, who had acted as solicitor for the claimant, had not taken out his certificate to practise during the progress of the arbitration, and that the claimant was therefore not entitled to recover his costs and disbursements against the company. There was no doubt that Lloyd had not taken out his certificate, but the claimant knew nothing of it until the objection was taken. The master having refused to tax the costs, the rule above mentioned was obtained.

A. T. Lawrence, shewed cause. The claimant having been represented during the arbitration by an uncertificated solicitor cannot recover his costs. By the Act 37 Geo. 3, c. 90, s. 30, an attorney who has not obtained a certificate is made incapable of maintaining an action for fees for prosecuting or defending suits, and by the

succeeding Act, 6 & 7 Vict. c. 73, s. 26, no person who as an attorney or solicitor shall sue, prosecute, or defend, or carry on any action or suit, or any proceedings, in any of the courts as aforesaid without a certificate shall be capable of maintaining any action for the recovery of any fee, reward, or disbursement for or in respect of any business, &c., done by him as an attorney or solicitor as aforesaid. On the construction of this last enactment it has been held that the fact of the attorney being uncertificated does not deprive the client of his right to costs against the opposite party to the extent of advances made by the client, where they have been made in ignorance of his attorney being uncertificated: *Reeder* v. *Bloom.* (1) But the Act has been amended by later Acts. It had been decided that s. 26 only applied to business done in the courts referred to in it: *Richards* v. *Lord Suffield* (2); and the Act 23 & 24 Vict. c. 124, s. 26, extends the disqualification to all business done by the solicitor without a certificate. After the passing of this Act it was held in *In re Hope* (3), following in *In re Jones* (4) that a litigant who has been ordered to pay costs cannot refuse to pay them on the ground that the solicitor on the other side is uncertificated. But since this decision the Act 37 & 38 Vict. c. 68, has been passed, which by s. 12 prevents such costs or disbursements from being recoverable by any person whomsoever.

B. F. Williams, in support of the rule. The Act 37 & 38 Vict. c. 68, did not by the words "any person" in s. 12 (5) contemplate

(1) 3 Bing. 9.

(2) 2 Ex. 616.

(3) Law Rep. 7 Ch. 766.

(4) Law Rep. 9 Eq. 63.

(5) Sect. 12: "Any person who wilfully and falsely pretends to be, or takes or uses any name, title, addition, or description implying that he is duly qualified to act as an attorney or solicitor, or that he is recognised by law as so qualified, shall be guilty of an offence under this Act, and be liable to a penalty not exceeding the sum of ten pounds for each such offence.

"No costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as an attorney or solicitor without being duly qualified so to act shall be recoverable in any action, suit, or matter, by any person or persons whomsoever.

"For the purposes of this section a person shall be deemed to be duly qualified to act as an attorney or solicitor if he shall have in force at the time at which he acts as an attorney or solicitor a duly stamped certificate authorising him so to do, pursuant to the provisions of the stamp laws and the laws for the time being relating to attorneys and solicitors."

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any person other than a solicitor. It was intended to prevent uncertificated solicitors from recovering their costs; but to mulct the client who is unaware of his solicitor's disqualification in all that he has paid for disbursements is unjust and unreasonable.

COCKBURN, C.J. I think this rule must be discharged. Under 6 & 7 Vict. c. 73, and earlier Acts relating to the qualification of solicitors, it was held that although the solicitor was prevented from recovering costs and disbursements in respect of business done while he was uncertificated, yet that the client himself could recover them from the opposite party. Then came the Act 37 & 38 Vict. c. 68, which in s. 12 introduces new words enacting that no costs or disbursements relating to anything done by an uncertificated solicitor shall be recoverable "by any person or persons whomsoever." The effect of these words is to extend the operation of the former Acts, and I think they were intended to include the present case, and to prevent, not merely the solicitor himself, but also his client, from recovering such costs. There can be no doubt that this construction may in particular instances operate harshly, but we have only to consider whether the words cover the case before us, and this they certainly do.

MELLOR, J. I am of the same opinion. I share the regret expressed by the Lord Chief Justice, but the policy of the Act being clear, we are bound to give effect to it.

LUSH, J. I am of the same opinion. The Act will no doubt occasionally cause hardship, but having regard to the plain meaning of the words, and to the decisions upon the previous Acts, I think that the intention of the legislature is quite clear. By the Solicitors Act, 6 & 7 Vict. c. 73, s. 26, no person who, as attorney or solicitor, shall carry on any proceedings in any of the courts without having a certificate which shall be then in force, shall be capable of maintaining any action for any fee or disbursement in respect of any business done by him whilst he shall have been without such certificate. The Act 23 & 24 Vict. c. 127, carries the disability a little further, for by s. 26, every person who acts as an attorney or solicitor contrary to 6 & 7 Vict. c. 73, s. 2 (that is, unless duly admitted, enrolled, and qualified) shall

be incapable of maintaining any action or suit for any fee or reward for or in respect of anything done or any disbursement made by him in the course of so acting; so that he is further prevented from recovering in respect of business done out of court. Upon the construction of these statutes it was held in 1872 that, although the solicitor was uncertificated, there was nothing to prevent his client from recovering the costs from the opposite side, for the Acts only prevented the solicitor from recovering in respect of his fees and disbursements made by him, saying nothing of his client's rights. Two years afterwards, the Act 37 & 38 Vict. c. 68, was passed, which in s. 12, as I have said, uses more general terms, which are quite large enough to include the client. The rule must be discharged.

Rule discharged.

Solicitors for claimant: *Schultz & Son.*

Solicitors for defendants: *T. White & Sons.*

LANGDON, APPELLANT; HOWELLS, RESPONDENT.

May 17.

Railway Company—Travelling without having previously paid Fare—Intent to avoid Payment of Fare—Railways Clauses Consolidation Act, 1845 (8 *Vict.* c. 20), s. 103.

The respondent who was travelling on the G. W. Railway in a train going to N. produced the "forward half" of a tourist return ticket from L. to N. and back. This ticket had been originally issued to another person and was stated on the back thereof to be not transferable. The original taker had used the ticket as far as H. on the way from L. to N., but then proceeded on a different route and, consequently not having given up the forward half of the ticket, sold it to the respondent who was travelling with it between H. and N.:—

Held, that the respondent was liable to be convicted under 8 & 9 Vict. c. 20, s. 103, for travelling without having previously paid his fare with intent to avoid payment thereof.

CASE stated by justices under 20 & 21 Vict. c. 43.

A complaint had been preferred by the appellant against the respondent under section 103 of 8 Vict. c. 20, for that the respondent on the 10th day of November, 1878, at the parish of Neath, in the borough of Neath, in the county of Glamorgan, unlawfully did travel in a certain, that is to say, a third class

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carriage belonging to the Great Western Railway Company, without having previously paid his fare, and with intent to avoid payment thereof contrary to the statute in such case made and provided.

It appeared that the respondent was travelling in a down train which arrived at Neath, and on being asked for his ticket there he produced the forward half of a tourist return ticket which had originally been issued at Ludlow for New Milford, but not to the respondent. He stated to the ticket examiner that he took the ticket at New Milford, but that they had collected the wrong half at Ludlow. The respondent was allowed at the time to go on to New Milford, but afterwards the complaint was preferred. It was subsequently admitted by the respondent that he had given 3*s.* for the forward half of the ticket so produced by him to the man who had originally taken the ticket, but who it appeared having used it from Ludlow to Hereford had then travelled viâ Hay and Brecon to Cardiff, and consequently had not given up the forward half of the ticket. It appeared that the tourist tickets had the words "not transferable" printed on the back.

One of the two magistrates who heard the complaint was in favour of convicting the respondent, but the other was of the opposite opinion, and considered that it was not necessary for a railway traveller personally to pay his fare, and that as it was proved: first, that the proper fare had been paid in the first instance for the ticket with which respondent was found travelling though not by respondent himself; secondly, that travellers holding tourist tickets were allowed to break their journeys; thirdly, that respondent was still travelling on a part of the line for which the half ticket was at all events available for the use of the person to whom it was issued (it having been issued on the 28th of September and in force for two months); he was not liable to be convicted of an offence under the section above mentioned, and that although the words "not transferable" were printed on the back of the railway ticket the holder of a transferred ticket ought not to be treated as guilty of a fraud under the Act of Parliament, but should either have been proceeded against by a civil action or at most for a breach of some bylaw of the company under which possibly the endorsement of the words "not transferable" was made.

In the result the magistrates dismissed the complaint. The

question for the Court was whether the complaint was rightly dismissed, and if not the case was to be remitted to the magistrates.

C. S. C. Bowen, for the appellant, contended that the magistrates ought to have convicted the respondent. He cited *Bentham* v. *Hoyle* (1); *Dearden* v. *Townsend.* (2)

No counsel appeared for the respondent.

COCKBURN, C.J. I think that the case comes within the provisions of the statute. It is not a case of a single ticket taken by A., but which A. being unable to use it hands over to B., a case which possibly might admit of different considerations. The ticket was a return ticket which the company issues at a cheaper rate because they find it advantageous to issue tickets to persons intending to return at a cheaper rate. If it is given by the original taker to a person who seeks to use it for a single journey, and so to travel at the cheaper rate for such journey, it seems to me clear that such person does travel without having previously paid his fare with intent to avoid payment thereof within the meaning of the Act. The case must be remitted to the magistrates.

MANISTY, J., concurred.

Judgment for appellant.

Solicitor for appellant: *R. R. Nelson.*

(1) 3 Q. B. D. 289. (2) Law Rep. 1 Q. B. 10.

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May 17.

THE GUARDIANS OF THE CLUTTON UNION, APPELLANTS; POINTING, RESPONDENT.

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 35, 36—*Water-closet, Earth-closet, or Privy, building a House without sufficient—One Privy for Two Cottages.*

The respondent built two cottages with one privy sufficient for the use of the occupiers of both cottages :—

Held, that he had complied with the requirements of the 35th section of the Public Health Act, 1875, on the ground that the section does not require a separate water-closet, earth-closet, or privy for every house built or rebuilt.

CASE stated from quarter sessions on appeal from the decision of justices dismissing an information by the appellants, the rural sanitary authority of the Clutton Union, against the respondent, under the 35th section of the Public Health Act, 1875, for re-building a cottage within the appellants' district without providing a sufficient water-closet, earth-closet, or privy for such cottage.

It appeared that two cottages, one of which was the cottage in question, had been pulled down entirely and rebuilt by the respondent, and that one new privy had been constructed for the use in common of the occupiers of both cottages. The privy afforded sufficient accommodation for both cottages, and the occupiers of both cottages had the right of using it. The magistrates on these facts dismissed the information, and the appellants thereupon appealed. The sessions dismissed the appeal, subject to a case.

Poole, for the respondent. The 35th section of the Public Health Act, 1875, provides that every house newly built or rebuilt shall have a sufficient water-closet, &c. There is nothing in the section to render it necessary that there should be a separate water-closet or privy for every individual house.

Charles, Q.C. (*Stonhouse Vigor*, with him), for the appellants. The 35th and 36th sections should be read together to ascertain the meaning. It is contended that so reading them the intention of the 35th section is that there should be a separate water-closet for each house. It is clear that under the 36th section the local authority can require a separate water-closet to be provided, for

they are made by that section absolute judges of what they will require under its provisions.

COCKBURN, C.J. I am of opinion that the order of sessions ought to be affirmed. The 35th and 36th sections are, in my opinion, entirely distinct, with specific objects respectively of a different character. The 35th relates to the building and rebuilding of houses without a sufficient water-closet, &c., and imposes a penalty in respect thereof. If the justices think that there is no sufficient water-closet, and impose a penalty, there is an end of the matter under that section. In the 36th section there is no reference to a penalty, but power is given to the sanitary authority at any time, whether proceedings have taken place under the 35th section or not, and quite irrespective of the result of such proceedings, to examine the premises, and if they are of opinion that the house is without a sufficient water-closet, &c., they may require the owner or occupier to provide one, and if he does not comply with their requirement, may do the work themselves. We are not called upon to put any construction on the 36th section, except so far as it may throw light on the meaning of the 35th. I do not see my way to the conclusion that the legislature intended in the 35th section that there must be a separate water-closet for each individual house. It would have been so very easy to insert a word which would express such an intention, that, finding no such word, I cannot think that such could have been the intention. It seems to me, therefore, that a water-closet common to the two cottages, if sufficient for the use of the occupiers of both, would satisfy the Act. This is a penal clause, and ought to be construed with some strictness.

MANISTY, J., concurred.

Order of Sessions affirmed.

Solicitors for appellants: *Nutt & Savery, for Perrin.*
Solicitor for respondent: *Clifton.*

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March 4; *May* 17.

ATWOOD AND OTHERS *v.* SELLAR & CO.

Ship and Shipping—General Average—Practice of Average Adjusters—Putting into Port of Refuge to repair—Expense of reshipping Cargo and leaving Port of Refuge.

10 QBD 431

A ship on her voyage with cargo to Liverpool encountering severe weather, the foretopmast had to be cut away and in its fall caused other damage to the ship, which was thereby compelled to put into port to repair. In order to effect the repairs, and to enable the ship to proceed on her voyage, it was necessary to discharge a portion of the cargo, and expense was incurred in landing and warehousing it. The repairs having been effected expense was incurred in reshipping such portion of the cargo. Further expense was incurred for pilotage and other charges in respect of the ship's leaving the port of refuge and proceeding upon her voyage. The ship ultimately reached her destination in safety. It has been for from seventy to eighty years the practice of English average adjusters in adjusting losses where ships have put into port to refit, whether such putting into port has been occasioned by a general average sacrifice, or a particular average loss, to treat the expense of discharging the cargo as general average, but the expense of warehousing it as particular average on the cargo, and the expense of reshipment of the cargo and pilotage, port charges, and other expenses incurred to enable the ship to proceed on her voyage as particular average upon the freight. The owners of the ship claimed to have the above mentioned expenses of warehousing and reshipment of cargo, and the pilotage and other expenses of leaving the port, treated as matter of general average, and sued the owners of the cargo for contribution in respect thereof:—

Held (by Cockburn, C.J., and Mellor, J., Manisty, J., dissenting), that the plaintiffs were entitled to recover on the ground that the expenses were all incurred in furtherance of the common purpose of prosecuting the adventure, and for the benefit of the cargo as well as the ship.

By Manisty, J., the above mentioned practice of average adjusters having existed for so long a period must be deemed to be the general mercantile usage of this country, and as such to have the force of law.

Affirmed 5 QBD 256 CA

SPECIAL CASE stated in an action by the plaintiffs as owners of the *Sullivan Sawin*, to recover 13*l.* 14*s.* 9*d.*, in respect of a general average contribution from the defendants as owners and consignees of certain goods on board the said vessel.

1. The plaintiffs are the owners of the ship *Sullivan Sawin*, and the defendants are owners and consignees of goods shipped on board the said vessel on the voyage hereinafter mentioned.

2. The said vessel sailed from Savannah for Liverpool on the 10th of February, 1877, and encountered severe weather in consequence of which a general average sacrifice became necessary, and

was made, the master being compelled to cut away the foretop-mast, the fall of which occasioned further damage to the vessel, which was thereby compelled to put into Charleston on the 21st of February, 1877, to repair the said damage.

3. In order to effect the said repairs, and to enable the vessel to proceed on her voyage, it was necessary to discharge a portion of the cargo, and expenses were incurred in landing, warehousing, and reshipping the same, and further expenses were incurred at Charleston for pilotage and other charges paid in respect of the ship leaving port and proceeding upon her voyage. The said vessel afterwards completed her voyage, and discharged her cargo at Liverpool.

4. It is and for from seventy to eighty years past has been the practice of British average adjusters in adjusting losses in cases where ships have put into port to refit, whether such putting into port has been occasioned by a general average sacrifice, or a particular average loss, to treat the expense of discharging the cargo as general average, the expense of warehousing it as particular average on the cargo, and the expense of the reshipment of the cargo, pilotage, port charges, and other expenses incurred to enable the ship to proceed on her voyage as particular average upon the freight. Cases of putting into port in consequence of general average sacrifice only, and where there is no particular average loss at all are not of frequent occurrence, but such cases and cases where the substantial cause of the putting into port is a general average sacrifice are sufficiently common to establish a regular practice of treating the expenses in case of a general average sacrifice in the way above described.

5. Average adjusters regulate their rules of practice in accordance with what they consider are the legal principles applicable to the subject. There is an association of average adjusters which holds meetings from time to time at which the rules of practice are discussed and altered or modified with reference to legal decisions.

6. In March, 1876, one eminent average adjuster formed the opinion that the practice, as above described, was wrong, and that all such expense as heretofore described up to the time when the ship was again at sea, and had resumed her voyage ought to be

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charged to general average; and since March, 1876, the said average adjuster has made up adjustments in two or three cases of the kind in accordance with his said opinion, but the practice of British average adjusters as above described has remained unaltered.

7. The case of the said ship, the *Sullivan Sawin*, was put into the hands of the said average adjuster to prepare the adjustment, which he did in accordance with his said opinion, charging the whole of the said expenses to general average, and the plaintiffs have brought this action against the defendants to recover the contribution appearing to be due from them in respect of their goods upon the footing of the said adjustment. The defendants have always been willing to pay a general average contribution upon the footing of an adjustment made up in accordance with the practice of British average adjusters as above described, but deny their liability to pay upon the footing of the said average adjustment which has been so prepared as aforesaid, and this action was brought for the purpose of determining whether or not they are so liable.

8. The plaintiffs contend that, notwithstanding the said practice of British average adjusters, they are entitled to have the whole of the said expenses brought into general average, and to receive a contribution from the defendants accordingly, and the defendants contend, firstly, that apart from the said practice general average expenditure ceases in such cases when the cargo has been discharged from the ship; and, secondly, that the said practice of average adjusters is a valid and binding custom, regulating the treatment of the said expenses, and the contribution to be paid by the defendants.

The question for the opinion of the Court is: Whether the plaintiffs are entitled to recover against the defendants a contribution in excess of what would be payable according to the said practice of average adjusters as stated in this case.

March 4. *Cohen, Q.C.* (*J. C. Mathew*, with him), for the plaintiffs. First with regard to the law independently of any alleged custom. The English law has no doubt established distinctions, unknown to the laws of most other countries, between expenses of putting

into a port of refuge and landing cargo, and those of reshipping the cargo and leaving the port for the prosecution of the voyage. But in the present case the basis of the argument for the plaintiffs is that the whole of the expenses here in question were the consequences of a general average sacrifice. The cutting away of the mast was a general average act, and the necessary consequence of that act was the further damage that happened to the ship. The ship having been thus obliged to put into port in consequence of imminent danger to the whole enterprise arising out of a general average sacrifice, all the expenses connected therewith are general average. No doubt when a ship merely puts into port to avoid stress of weather, this, though it may be an act of prudence, is not in the nature of a general average sacrifice, and there such expenses as these would not be general average. But it is contended that in the present case, inasmuch as all these expenses were the consequence of a general average sacrifice, not only the expense of discharging the cargo, but also the expenses of warehousing and reshipping it, and the pilotage and other expenses of leaving the port of refuge were general average. [He cited on this point, in addition to cases referred to in the judgments, Lowndes on General Average, 267, 287; Abbott on Shipping, 3rd ed. 335; 2 Phillips on Insurance, 1326; *Hall* v. *Janson*. (1)]

Secondly, the finding of the case with regard to the practice of average adjusters is immaterial. For the purposes of this question it must be assumed that the law is as before contended. There is no express contract here in the bill of lading with regard to adjustment of average, as there was in *Stewart* v. *Pacific Steam Ship Company*. (2) The contract, therefore, would be that adjustment of average should be according to English law, but no evidence of a custom would be admissible to control what would otherwise be the effect of the contract unless such evidence also raised a presumption that the custom was known to the party to be affected by it.

Here the bill of lading was given in Savannah, and the ship was an American ship. There is, it is submitted, nothing to shew that this practice of average adjusters was known to the plaintiffs.

(1) 4 E. & B. 500; 24 L. J. (Q.B.) 97. (2) Law Rep. 8 Q. B. 88.

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See *Mollett* v. *Robinson*. (1) This is not put as a general custom of trade, but merely as the custom of average adjusters. This alleged custom is altogether different from any custom that has been held good for the purpose of modifying a contract. A well-known incident may be added to a contract on the ground that all parties must have contemplated it. Average adjusters do not profess to alter the law, or to add any incident to the contract. They regulate their practice in accordance with what they suppose to be the law and the effect of the decisions. Suppose a decision to have been unquestioned for a long time, but to be at length overruled, and in the meantime average adjusters have all regulated their practice by it, they would then alter their practice. This shows that this practice is not necessarily meant to be a permanent thing like a legal usage. [He also cited on this point *Kirchner* v. *Venus* (2); *Norden Steam Ship Company* v. *Dempsey* (3); *Couturier* v. *Hastie*. (4)]

Webster, Q.C. (*Fullarton*, with him), for the defendants. The plaintiffs wish to have the law of England on this subject assimilated to the law of most foreign countries, from which it at present differs. But the result would be to substitute for a plain and simple rule one involving the greatest difficulty and doubt. At present the law is clear. If a vessel springs a leak or is in any other imminent peril and bears up for a port of refuge, the expenses of entering the port of refuge and unloading for repairs are general average on the ground that the common peril was the cause of the going into port. The commencement of the general average act is the bearing up for the port, but it terminates when ship and cargo are in safety.

What difference can it make that the original peril is caused by a general average act? If the damage is caused by perils of the sea, and there is a common danger to all parties to the enterprise, the English law regards the bearing up for the port of refuge as a general average act, but why is the termination of the general average act to be affected by the fact that its commencement must be put a little earlier in the present case, viz. when the mast was cut away? In reality what the plaintiffs contend for is a principle

(1) Law Rep. 5 C. P. 646; 7 C. P. 84; 7 H. L. 802.
(2) 12 Moo. P. C. 361.
(3) 1 C. P. D. 654.
(4) 8 Ex. 40; 22 L. J. (Ex.) 299.

which the English courts have frequently refused to apply. The laws of the foreign countries to which reference has been made do not stop short where the contention for the plaintiffs asks the Court to stop short. They do not admit any distinction between the expenses of entering the port of refuge and unloading the cargo, and those of reshipping the cargo and leaving the port to prosecute the voyage. It is contended that the law of England is uniform in all cases, viz., that when the common peril has terminated no further expense incurred is general average. [He cited on this point, in addition to cases referred to in the judgments, Abbott on Shipping, 3rd ed. 335; and 5th ed. 347.]

Secondly, the custom of average adjusters as found by this case is binding unless unreasonable. The law of all countries is that the port of destination is the place of adjustment, and that the adjustment must be regulated by the practice there. [He cited on this point: *Lohre* v. *Aitchison* (1); *Simonds* v. *White*. (2)]

Cohen, Q.C., in reply.

Cur. adv. vult.

May 16. The following judgments were delivered:

MANISTY, J. This was an action brought by the plaintiffs as owners of the American ship *Sullivan Sawin* to recover from the defendants as owners and shippers of goods on board that vessel at Savannah a small sum of money (13*l.* 14*s.* 9*d.*), as a general average contribution under the following circumstances.

The ship sailed from Savannah for Liverpool, on the 10th of of February, 1877, and encountered severe weather, in consequence of which a general average sacrifice became necessary and was made by cutting away the foretopmast, the fall of which occasioned further damage to the vessel, which was thereby compelled to put into Charleston to repair.

In order to effect the repairs and to enable the vessel to proceed on her voyage, it was necessary to discharge a portion of the cargo, and expenses were incurred in landing, warehousing, and re-shipping it. Further expenses were also incurred at Charleston for pilotage and other charges in respect of the ship leaving Charleston and proceeding on her voyage.

(1) 2 Q. B. D. 501; 3 Q. B. D. 558. (2) 2 B. & C. 805.

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The vessel completed her voyage and discharged her cargo at Liverpool.

The facts are more fully stated in a special case, and the question to be decided is whether the plaintiffs are entitled to have the expense of warehousing that portion of the cargo which was discharged at Charleston, and the expense of re-shipment of it and the pilotage, port charges, and other expenses, incurred at Charleston, in respect of the ship leaving that port and proceeding on her voyage to Liverpool, or any, and if so which, of such expenses brought into general average.

The plaintiffs contend that they are entitled to have them all brought into general average. The defendants contend that by the law and usage in England none of the expenses in question are the subject of general average, but are particular average, the expense of warehousing being particular average on cargo, and the expense of re-shipment of the cargo and pilotage, port charges, and other expenses incurred to enable the ship to proceed upon her voyage being particular average on freight.

It is found as a fact in the case that it is, and for from seventy to eighty years has been, the practice of British average adjusters in adjusting losses in cases where ships have put into port to refit, whether such putting into port has been occasioned by a general average sacrifice or a particular average loss, to treat the expense of discharging the cargo as general average, but the expense of warehousing it as particular average on the cargo and the expense of the reshipment of the cargo, and the pilotage, port charges, and other expenses incurred to enable the ship to proceed on her voyage as particular average upon the freight.

Recently, according to the statement in the special case, one eminent average adjuster formed the opinion that this practice is wrong, and this action is brought to have the matter judicially decided. It is necessary, therefore, to consider what is the law of England with respect to the adjustment of the loss in question, it being admitted that the loss must be adjusted according to that law.

The principle of general average, or general contribution, is, as is well known, derived from the ancient laws of the Rhodian Republic. It was imported into the Roman law and forms a

head (1) in the Digest of Justinian, with an express recognition of its origin. It has since been adopted by all commercial nations, but with so many variations, in different nations, as to the application of the principle that, as has often been remarked both by judges and text writers, no principle of maritime law has been followed by more variations in practice. In one point it would seem that all nations agree, namely, that in the absence of any particular instrument or contract the place at which the average is (as between owner of ship and owner of goods) to be adjusted is the place of the ship's destination or delivery of her cargo. As regards the law of England, it was laid down in the year 1824 in the considered judgment of the Court of King's Bench, delivered by Abbott, C.J., in the case of *Simonds* v. *White* (2), that "the shipper of goods tacitly, if not expressly, assents to general average as a known maritime usage which may, according to the events of the voyage, be either beneficial or disadvantageous to him—and by assenting to general average he must be understood also to assent to its adjustment, and to its adjustment at the usual and proper place, and to all this it seems to us to be only an obvious consequence to add that he must be understood to consent also to its adjustment according to the usage and law of the place at which the adjustment is to be made."

Assuming this to be, as I think it is, a correct exposition of the law of England, it seems to me to go far towards deciding this case in favour of the defendants.

But it is said on the part of the plaintiffs that the special case does not find what has been the usage and practice of shippers and shipowners in England, but only what has been the practice of British average adjusters.

I am of opinion that, in the absence of any evidence to the contrary, the usage and practice of average adjusters for so great a length of time must be deemed and taken to have existed from all time, and to have been acquiesced in, and so to have become the usage and practice of shippers and shipowners: see *Stewart* v. *West India Pacific Steam Ship Co.* (3)

I am at a loss to comprehend how the law of any particular

(1) De lege Rhodia de jactu. (2) 2 B. & C. 805–13.
(3) Law Rep. 8 Q. B. 88–94.

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nation as to general average can be arrived at except by ascertaining what has been, as a matter of fact, the usage and practice in such particular nation with regard to it.

A great many cases were cited in the course of the argument, commencing with *Plummer* v. *Wildman* (1), which was decided in the year 1815, and ending with *Stewart* v. *West India and Pacific Steam Ship Co.* (2), decided in 1873. I do not propose to notice many of those cases. Some have been expressly or impliedly overruled; some were actions on policies of insurance or bills of lading containing special provisions; others contain dicta not altogether consistent with the usage found by the case. But it seems to me that *Simonds* v. *White* (3), *Job* v. *Langton* (4), and *Walthew* v. *Mavrojani* (5), coupled with the finding in the present case as to what has hitherto been the usage and practice of British average adjusters, are very strong if not conclusive authorities in favour of the defendants. I have already adverted at some length to the judgment in *Simonds* v. *White.* (3) In *Job* v. *Langton* (4) it was held that expenses incurred, after the cargo was in safety, in getting off the ship and towing her to Liverpool for repair were not chargeable to general average but to ship alone. I notice this case not only because it is an authority in favour of the present defendants, so far as general principles are concerned, but also because Lord Campbell, C.J., in delivering the considered judgment of the Court (consisting of himself and Coleridge, Erle, and Crompton, JJ.), says: "*There is no mercantile usage stated to guide us.* We must *therefore* resort to the general principles on which this head of insurance law rests;" from which I infer that if a mercantile usage had been stated the Court would have been guided by it.

In *Walthew* v. *Mavrojani* (5) (which was decided in the Exchequer Chamber in the year 1870 by six eminent judges, affirming a judgment of the Court of Exchequer) the question was whether the expense of getting a ship off a bank on which she had been stranded by a storm was general average, seeing that before the expense was incurred the cargo had been discharged and ware-

(1) 3 M. & S. 482.
(2) Law Rep. 8 Q. B. 88.
(3) 2 B. & C. 805.
(4) 6 E. & B. 779, p. 790; 26 L. J. (Q.B.) 97.
(5) Law Rep. 5 Ex. 116.

housed. The Court held that it was not general average, inasmuch as, although the expense was incurred with the view and for the purpose of prosecuting the voyage, it was incurred after the cargo was in a place of safety and when the ship only was in peril. Bovill, C.J., says, at p. 124: "The American Courts have enlarged the limit of general average and have included within the description of extraordinary expenses incurred for the common benefit the expenses of repairs rendered necessary by extraordinary perils and made at an intermediate port for the purpose of prosecuting the voyage, and have in some other respects deviated from what we consider the strict rule, but the English Courts have held strictly that unless there be a common risk and a voluntary sacrifice or an extraordinary expenditure incurred for the joint benefit of ship and cargo, a claim to general average is not established." And a little further on the same learned judge says: "To ground a claim for general average there must be a danger, actual or impending, common to both ship and cargo; here the cargo was safe and the ship only in peril; it was indifferent to the owners of the cargo whether the ship floated or not, and there was therefore no sacrifice made or extraordinary expense incurred to save both ship and cargo or for the common benefit of both."

In the same case (1) the same learned judge says, "The claim has been put on the ground that the adventure was not complete, and that until it was terminated there was a common interest that it should be carried out; but that argument is in direct contradiction to the principle laid down with respect to repairs which are equally necessary to enable the ship to complete the adventure, but which are not matters for general average."

In these observations, which are very pertinent to the present case, I entirely agree.

Mr. Cohen, in his able argument, says these are cases in which the cause of the extraordinary expenditure was an ordinary peril of the sea unaccompanied by a general average cause, such as the cutting away of the mast, and he says that the existence of a general average cause distinguishes those cases from the present.

Let us consider that proposition practically. One ship meets with a storm so severe that it is deemed necessary for the safety

(1) Law Rep. 5 Ex. 125.

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of ship and cargo to run for an intermediate port, and it succeeds in reaching it without any voluntary sacrifice of any part of the ship or cargo. Another ship meets with a similar storm, and finds it necessary to run for an intermediate port, but, in order to reach it, is obliged to make a voluntary sacrifice of part of the ship, say, a mainmast or part of the cargo. Why should there be any distinction in the two cases with respect to what is to be deemed general and what is to be deemed particular average after the cargo is landed in a place of safety? The cases are identical, save and except as regards the loss caused by the voluntary sacrifice of part of the ship or cargo. I am unable to see any principle upon which to rest the distinction suggested by Mr. Cohen; and it is, so far as I know, unsupported by authority. Certainly none has been cited in support of it.

Mr. Cohen further contended that it ought not to be presumed that foreigners contract with reference to the custom and practice of England in regard to general and particular average, and that inasmuch as the *Sullivan Sawin* was an American ship, and the cargo was shipped at Savannah, the plaintiffs were not bound by the usage in England. That contention is in direct contradiction to the law as laid down in *Simonds* v. *White* (1), which, so far as I know, has never been questioned.

There is only one other argument put forward on behalf of the plaintiffs which I think it necessary to advert to. It is said that the Court should adopt the principle contended for by the plaintiffs, in order that the law of England may be conformable to foreign law. The answer to this argument is that the adoption of the principle contended for would unsettle the usage and practice which has hitherto existed and been acted upon in England, while it would still leave the usage and practice of many other nations at variance with that of England and of each other.

I think it is much safer to adhere to a usage which has been acted upon, for aught that appears to the contrary, ever since England adopted the law of general average, than to introduce a new usage for no other reason, that I can perceive, than that such new usage would be more consonant with strictly logical principles. Such an alteration ought, in my opinion, to be effected, if at all, by

(1) 2 B. & C. 805.

legislation, and not by a decision of a court of law. Moreover, it is very immaterial what usage any particular nation may have adopted with respect to particular or general average, so long as that usage has been uniformly acted upon, and so become well known to all concerned.

For these reasons I am of opinion that the defendants are entitled to judgment.

The judgment of Cockburn, C.J., and Mellor, J., was delivered by

COCKBURN, C.J. This was a case of general average, arising under the following circumstances.

The plaintiffs' ship, the *Sullivan Sawin*, sailed from Savannah for Liverpool with a general cargo. Encountering a storm, the master found it necessary to cut away the foretop-mast, and the mast in falling caused such further damage as rendered it necessary to put into Charleston to repair the ship, in order to enable it to prosecute the voyage. To do the repairs, it became necessary to unship a portion of the cargo, and to land and warehouse it, and the repairs of the ship having been completed, the goods had to be re-shipped. Expenses were also incurred on account of pilotage and other charges on the ship leaving the port in order to proceed on her voyage. The voyage was completed, and the cargo safely discharged and delivered at Liverpool, its proper destination.

The plaintiffs, the shipowners, claim contribution by way of general average from the defendants, the owners of the cargo, in respect not only of the expense of entering the port and of discharging the cargo, but also that of warehousing and re-shipping the latter, as well as in respect of expenses incurred in the way of port charges and pilotage on the occasion of the vessel again putting to sea. The defendants, while they admit their liability to contribute to the expenses of entering the port and of discharging the cargo, deny any liability beyond that stage, taking their stand on the usage of average adjusters in this country, according to which the expense of entering the port of refuge and discharging the cargo has, under such circumstances, been treated as general average, but the expense of warehousing the cargo has been treated as particular average on the cargo, and

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that of the re-shipment, pilotage, port charges, and other expenses incurred to enable the ship to proceed on her voyage, as particular average on the freight.

That such has been the practice of average adjusters in this country for from seventy to eighty years is admitted; but the plaintiffs deny the validity of this practice, as being inconsistent with the principles of law relating to average.

Two questions present themselves: first, what, independently of this practice of average adjusters, is the principle or rule of law applicable to the case? Secondly, assuming the practice to be inconsistent with what otherwise should be the law, having subsisted for so long a time, must it be taken to give the rule properly applicable to such a case?

No claim being made by the plaintiffs of general average in respect of anything expended on the ship itself—the claim as stated in the case being limited to the expense of discharging the cargo, and of warehousing and re-shipping it, and to expenses incurred for pilotage and other charges on the ship's leaving port—the question which presented itself in *Power* v. *Whitmore* (1) and in *Hallett* v. *Wigram* (2), as to how far repairs done to a ship—even to the extent of such temporary repairs only as would be necessary to enable it to proceed on the voyage — may be the subject of general average, does not arise. We have to deal only with the expenses incurred on entering and quitting the port, and in unshipping, warehousing, and re-shipping the cargo.

That these expenses which, according to the practice of average adjusters in this country, are thus treated as particular average, should, according to legal principles, be made the subject of general average, appears to me to flow necessarily from the fundamental principle on which the whole doctrine of general average rests, namely, that all loss which arises from extraordinary sacrifices made, or expenses incurred, for the preservation of the ship and cargo must be borne proportionably by all who are interested.

The contract between the goods owner and the shipowner, on a charterparty or a bill of lading, being for the conveyance of the goods to a given port, there occurs in the course of the voyage a state of things which is not provided for by the contract. A

(1) 4 M. & S. 141. (2) 9 C. B. 580.

storm arises; the vessel is in danger; but a port is within reach, in which, in the common interest of all concerned, it would be prudent to take refuge. Or it becomes necessary to cut away a mast, and, as the consequence of so doing, to seek an intermediate port in order to replace it. Or the ship sustains damage from the violence of winds or waves, which renders it necessary, for the common safety of ship and cargo, and for the further prosecution of the adventure, to seek a port at which repairs which have become necessary for the safe prosecution of the voyage may be effected.

The result is that, in theory at least, a new arrangement not contemplated or provided for by the original contract takes place between the parties, who in theory, as formerly in fact, must be supposed to be present—each in the practice of modern times represented by the master, to whom the interests of both are committed. If we could suppose both parties to be actually present, and under a sense of imminent danger to concur in the necessity of seeking a port of refuge, but to be discussing the question as to how the expenses incidental to such a course should be borne, what arrangement could be more reasonable or just than that these expenses, being extraordinary expenses incurred for the common benefit, should be borne in common, on the same principle as that which has been established from the earliest times in the case of actual jettison?

Applying this principle with reference, in the first place, to the expenses incurred by the ship, it is admitted on all hands that the expenses of entering the port of refuge should be carried to general average. Logically, it would seem to follow that, as the coming out of port is—at least where the common adventure is intended to be, and is afterwards further prosecuted—the necessary consequence of going in, the expenses incidental to the later stage of the proceeding should stand on the same footing as the former. The further prosecution of the voyage was in the contemplation of the parties, or of the master as representing them, in going in: the coming out, therefore, as essential to the further prosecution of the voyage, must equally have been in view when the resolution to go in was formed. But it is said—and it is upon this ground that the difference between the two

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sets of expenses is alleged to be founded—first, that it is the shipowner's duty under his contract to keep the ship in a navigable state, and consequently to repair any damage she may have sustained; secondly, that, when the ship has been repaired, it is the owner's duty under his contract to reship the goods, and to set forth again on the voyage, and to that end to incur the cost of quitting the port, and of employing a pilot or a tug if necessary. The whole of this reasoning appears to me to be based on an assumption altogether fallacious. The shipowner is not bound to repair for the purpose of carrying on the cargo; nor, having repaired, does he become bound to reship the cargo and complete the voyage under the original contract, but if bound to do so at all, is bound only under that contract as modified by the altered circumstances of the case.

The contract it should be remembered expressly exempts the shipowner from performance of his obligations under it when performance is prevented by perils of the seas. The ship having become incapacitated from prosecuting the voyage, and performance of the contract having been prevented by the excepted cause, the shipowner is under no obligation, so far as the goods owner is concerned, to repair. He cannot, it is true, expose the goods of the freighter to further peril by persisting in carrying them on, if, having the opportunity of putting into a port of refuge, he cannot, or will not, when there, repair the ship; but, if he chooses to forego his right to freight, he may repair or not as may best suit his interest.

"Under a charterparty containing such an exception," says Parke, B., in delivering the judgment of the Court in *Worms* v. *Storey* (1), "if the vessel sails in a seaworthy state, and in the course of the voyage is damaged by perils of the sea, the owner is not bound to repair it; but if he does not choose to repair, he ought not to go to sea with the vessel in an unseaworthy state, and so cause a loss of the cargo: he ought either to repair or stop." It is true that in *Worms* v. *Storey* the liability to repair was not the question immediately before the Court, the cause of action stated in the declaration, and on which there was a demurrer, being that the shipowner, after having put into

(1) 11 Ex. 427, at p. 430.

a port where the ship might have been repaired, had put to sea again with the vessel in an unseaworthy state, and had thus occasioned the loss of the plaintiff's goods. The question was however one which the Court had incidentally to consider, inasmuch as, if the shipowner had been under an obligation to repair, the proceeding to sea when the ship was unseaworthy would have been a fortiori actionable. But the view of the Court of Exchequer is supported by other considerations. By the express condition of the contract performance by the shipowner is dispensed with if prevented by perils of the seas. If it were true that under such circumstances he was nevertheless bound to repair, it would follow that he would be bound to do so without regard to the amount of the cost of repair, or to the degree to which the expense might involve him in loss. Yet it is well settled that where the cost of the repairs will exceed the value of the vessel when repaired, together with the freight, the owner is not bound to repair in order to carry on the cargo: and that the master, as his agent, will be justified, as against the goods owner, in abandoning the voyage: see *De Cuadra* v. *Swann* (1), where the law on this head was made the subject of learned and elaborate argument.

Some confusion may have arisen from the vague language in which the duty of the master to repair, after having gone into a port of refuge, is spoken of. Thus, in *Benson* v. *Chapman* (2) it is said in general terms that "the duty of the master, in case of damage to the ship, is to do all that can be done towards bringing the adventure to a successful termination; to repair the ship, if there be a reasonable prospect of doing so at an expense not ruinous, and to bring home the cargo and earn the freight, if possible." But however general the language here used, it is plain, on reference to the facts of the case, that the proposition thus stated related only to the duty of the master towards his owner. In the case of *Benson* v. *Duncan* (3) in the Exchequer Chamber, Patteson, J., in delivering the judgment of the Court, says: "In ordering the repairs of the ship the master acts exclusively as agent of the owner of the ship. No other person but the owner of the ship or his agent can have any authority to

(1) 16 C. B. (N.S.) 772. (2) 2 H. L. C. 696.
(3) 3 Ex. 644, at p. 655.

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order the repairs. The owner of the cargo cannot insist on such repairs being made, for the shipowner is absolved from his contract to carry if prevented by the perils of the seas, and he is bound by it if prevented by inherent defects in the ship: in either case, if he does repair, he does so for the sake of earning the freight, which the master is bound to enable him to do if he can." The true rule is correctly stated in Maude and Pollock on Shipping, p. 438: "The owner of the cargo cannot insist on the repairs being done, for the shipowner is absolved from his contract to carry if prevented by the perils of the seas; but, on the other hand, it is the duty of the master, as the agent of the shipowner, to repair the ship if there be a reasonable prospect of doing so at an expense not ruinous, and to bring home the cargo and earn the freight, if possible."

But does the converse of the proposition equally hold? Though the shipowner or his master is not bound to repair, if he does so, is he released from the obligation to carry on the goods, or does the obligation to fulfil the original contract thereupon revive? At first sight it would seem to follow, from the position that the owner is absolved from his contract by the damage to the ship, and therefore is free from any obligation to repair, that he becomes released in toto, and, therefore, would be free, if he chose to sacrifice the freight, to decline to carry on the goods. But, though not arising directly out of the original contract to carry, the obligation presents itself under a different form. In the contract of affreightment there is an implied undertaking on the part of the shipowner, in consideration of his being intrusted with the custody of the goods, that if the further prosecution of the voyage should be interrupted by disaster to the ship, if he cannot, or does not choose to, trans-ship the cargo and send it on in another vessel in order to earn the freight, he will do his best to protect the interest of the goods owner; and, therefore, if the circumstances will admit of it, must find another vessel and forward the goods to their destination. Upon which assumption it may be contended that as the ship, having been repaired and rendered fit to resume the voyage, is available for the purpose, the master will be bound, as the best course to promote the interest of the goods owner, to reship the goods on board his owner's ship.

But the question is by no means free from difficulty. In the first place, it is not settled that the master, though he has the right to trans-ship, is bound to do so as the agent of his owner. The opinions of the foreign jurists, which will be found collected in Parsons on Shipping, in a note at p. 234, are altogether conflicting; and although we learn from the author just referred to that it is now well settled in the courts of the United States that the master is bound to trans-ship, if there be a vessel or other means of transport to the place to which the cargo should go within reasonable reach, there has been no decision to that effect in a court of this country. The question presented itself in *Shipton* v. *Thornton* (1), but it became unnecessary to decide it. But even if we assume that it would be the duty of the master, as becoming ex necessitate the agent of the shipper, to trans-ship the cargo, it must not be forgotten that he continues the agent of his owner; and in the latter capacity, if he can find a more remunerative employment for the ship, or can earn a higher rate of freight, he may be justified in declining to carry on the goods.

But even if this point were, like the foregoing, assumed in favour of the goods owner, the case of the latter in the present instance would be no further advanced. For the whole argument in his favour rests on the fallacious assumption that the rights and obligations of the parties remain as they existed under the original contract. But this is to overlook the fact that by the interruption of the voyage, and the absolution of the shipowner from the further performance of it, and the new arrangement which must be taken to have been come to between the parties on deciding to enter the port of refuge, the original contract has been essentially modified: in fact a new one has been engrafted on it.

Let us see what is involved in the arrangement so made. In legal theory we must suppose the parties to be present. In contemplation of law, the master, as representing both of them, makes for both the agreement which it is reasonable to suppose that, if present, they would have made for themselves. Now, the common purpose is twofold. The first and immediate purpose is that of saving ship and cargo, by bringing both into harbour. The second is that of repairing the ship with a view to the further

(1) 9 A. & E. 314.

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prosecution of the voyage, if such repairs should prove reasonably practicable, with certain reservations on the part both of the shipowner and the goods owner, which possibly may lead to the abandonment of the further prosecution of the voyage. The second of these purposes involves several subordinate operations and expenses incidental thereto.

The state of the ship and the degree of damage it has sustained, have first to be ascertained. To effect this, as well as to do the necessary repairs, it may be necessary to unship the cargo. To preserve the goods from harm they will have to be warehoused. The repairs to the vessel having been done, the cargo must be reshipped. Lastly, all things having been completed, the ship will have to leave the port to put to sea. In respect of each of these stages expenses have to be incurred, for which, as being altogether dehors the original contract, that contract wholly fails to provide. They are extraordinary expenses incurred for the preservation of ship and cargo, and in furtherance of the common adventure, under circumstances in which the ship and cargo would otherwise have perished, or the common adventure would have been abruptly brought to a termination.

Upon whom should the expenses of these different operations fall? The practice of the average adjusters makes the unloading of the cargo matter of general average; and as it seems to me, on principle rightly so. On what ground the distinction between the cost of unshipping the cargo, and of warehousing it, which is thrown on it as particular average, and that of reshipping, which is treated as particular average on the freight, is founded, I wholly fail to perceive. Looking to the common purpose for which all these operations are performed, it seems only reasonable and just that the expenses should be borne rateably by all parties concerned—in other words be treated as general average—so far, at all events, as the common purpose has been effected.

It is true that it not unfrequently happens that, the primary purpose of putting into port having been accomplished, the ulterior purpose, that of further prosecuting the voyage, fails. There may be no means in the port of refuge for repairing the vessel. The cost of repairing may be so great as not to make it worth the owner's while to repair in order to earn the freight.

As regards the alternative of trans-shipment, there may be no opportunity to trans-ship; or only at an increased rate of freight, on which account the shipowner may decline to trans-ship, except on account of the goods owner. On the other hand the cargo may be of a perishable nature, or it may be so damaged that it cannot be carried on further without becoming worthless; or the repairs to be done to the ship will take so long a time that in the interest of the goods owner the master would not be justified in detaining the goods, but, acting as the agent of the latter, becomes bound to forego the right of carrying on the goods and so earning the freight, and must deal with them in the interest of their owner alone. In such cases it may well be that only the expense of putting into the port of distress could properly be made matter of general average, and that other expenses incurred, but from which no benefit results to the common adventure, should be treated as particular average to ship or goods, as the case may be. But we are here dealing with a case in which every expense has been incurred with a view to, and has resulted in, the further prosecution of the common adventure. The ship and cargo have been saved from destruction by being brought into port; the ship has been repaired; the cargo, having in the meantime been preserved by being warehoused, has been reshipped; the voyage has been resumed, and brought to a safe conclusion, and the goods have been delivered; in a word, the common purpose, the fulfilment of the contract of affreightment, has been effected. But how has this result been brought about? By the series of operations which have taken place from the ship's going into port to her putting to sea again inclusively. But the whole of these operations were necessary to the resumption of the voyage; the expenses of carrying them out were each of them incurred in furtherance of the common purpose. Not being expenses within the scope of the original contract, but extraordinary expenses incurred for the common benefit of ship and cargo, the conclusion appears to me irresistible that, with the exception of the cost of repairs to the ship, all these expenses should be charged to general average. As regards the cost of unloading and reloading, Lord Campbell, in *Hall* v. *Janson* (1) says: "The expenses necessarily incurred in

(1) 4 E. & B. 500, at p. 507.

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unloading and reloading the cargo for the purpose of repairing the ship, that she may be made capable of proceeding on the voyage, have been held to give a claim to general average contribution; for the acts which occasion these expenses become necessary from perils insured against; and they are deliberately done for the joint benefit of those who are interested in the ship, the cargo, and the freight."

This reasoning, in which I entirely concur, applies equally to expenses incurred in leaving the port, which, like the expenses of unloading, warehousing, and reloading, are expenses incurred in furtherance of the common enterprise, and must be taken, like them, to have been contemplated from the moment the resolution was taken to enter the port, as the necessary consequence of doing so. All such expenses, being extraordinary expenses, that is to say expenses arising out of a state of things not provided for by the original contract, must be matter of general average.

The exclusion of the cost of repairs to the ship from general average will not conflict with this conclusion, as it rests on exceptional grounds, namely, that the benefit of the repair enures to the owner beyond the scope of the voyage, and that it would therefore be unjust to the goods owner, whose interest is limited to the voyage, to make him contribute to such cost. A distinction has, indeed, been taken between general repairs and such temporary repairs as are necessary to enable the ship to complete the voyage. By the American law, as well as by that of many other maritime nations, such temporary repairs have been made the subject of general average, and this—assuming always that such repairs are of a temporary character only, and add nothing to the permanent value of the vessel—would certainly appear to be consistent with principle. It is, however unnecessary to pronounce any opinion on this point, since, as has been already observed, no claim is made in this action for repairs. Nor is it necessary to consider whether, as the unseaworthiness of the vessel was caused by the jettison of the mast, and by damage occasioned by its fall—it being an admitted principle that consequential damage immediately caused by jettison is to be treated as jettison—the damage so caused might not have been made the foundation of a claim for general average, as no such claim is here made.

We have next to consider whether the practice of average adjusters in this country, which is said to have existed for seventy or eighty years, if thus found to be at variance with legal principles, shall nevertheless prevail, and must be considered as having settled the law. I am not aware of any principle on which the affirmative of this proposition can be maintained, or of any authority by which it can be upheld. The practice in question is not a usage of trade by which the terms of a contract may be interpreted or modified. It is not a custom which can be presumed to have had a legal origin. It is not the inveterata praxis of a court or courts having judicial authority, and which must therefore be taken to be the law though inconsistent with general principles. The authority of average adjusters may be said to be of an anomalous character. By the consent of shipowners and merchants they act as a sort of arbitrators in the settlement of matters of average; but they are bound, in the adjustment of such claims, to follow the law, and in the practice they have adopted they have not acted or intended to act on or give effect to any mercantile usage, but have intended to give effect to what they believed to be the law; but they have mistaken it. What was said by Pollock, C.B., in *Cox* v. *Mayor of London* (1), is here in point. In that case a plea had been pleaded to a declaration in prohibition, alleging an immemorial custom, on a plaint being entered in the Lord Mayor's Court, to attach a debt due to the defendant from a third person, upon his being found within the jurisdiction, though none of the parties were citizens or resident in the city, and neither the original debt nor that due from the garnishee had accrued within it. The plea having been demurred to, the Lord Chief Baron in giving judgment says: "In holding this plea bad we neither overrule nor dissent from any former decision, for in no previous instance has the custom here stated been brought before any court, by plea or certificate, and held to be good. The superior Courts have at all times investigated the customs under which justice has been administered by local jurisdictions, and unless they are found consonant to reason and in harmony with the principles of law, they have always been rejected as illegal."

(1) 1 H. & C. 338, at p. 358.

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The terms in which the Chief Baron thus stated the law were expressly approved of by Lord Cranworth in giving judgment in the House of Lords on appeal. The law so stated appears to me to be a fortiori applicable to the present case. If a custom prevailing in a Court, which, though an inferior Court, is still a court of law, if inconsistent with law cannot prevail, surely the same rule must apply to a practice of average adjusters. When a practice of this kind is brought to the test of legal decision and is found to be erroneous and inconsistent with law, it cannot be permitted to override the law and acquire the force of law.

Three cases are relied on in opposition to the view expounded in the foregoing reasoning, and on which it may be desirable to make one or two observations, namely, *Simonds* v. *White* (1); *Stewart* v. *Pacific Steam Ship Company* (2), and *Walthew* v. *Mavrojani*. (3) Neither of these cases appear to me to be in point to the one before us. The point to be decided in the first of them, was whether the average which had to be adjusted should be determined according to the law of Russia or that of this country. Lord Ellenborough, C.J., after stating that this was the question, says that the shipper must be taken to assent to the adjustment "according to the usage and law of the place at which the adjustment is to be made."

So far as relates to the place of adjustment, we are of course bound by this decision, and are therefore not at liberty to give effect to Mr. Cohen's argument, that the rights of the parties must be determined according to the law of the place where the average occurred, even if otherwise disposed to do so. But if any stress is sought to be laid on what Lord Ellenborough says as to "usage," it is to be observed that he is speaking (as is manifest from the language of the judgment throughout), of a usage consentaneous with the law. It would be to give a mistaken effect to his language to suppose he was referring to a usage at variance with the law.

The case of *Stewart* v. *Pacific Steam Ship Company* (2), far from supporting the defendant's case, appears to me a strong authority the other way. There, by the terms of the bill of lading, average,

(1) 2 B. & C. 805. (2) Law Rep. 8 Q. B. 88.
(3) Law Rep. 5 Ex. 116.

if any, was "to be adjusted according to British usage." A fire having broken out in the ship, water was poured in to extinguish it, and bark shipped on board by the plaintiffs was seriously damaged thereby. The plaintiffs claimed as for general average, but it appeared that it was the practice of average adjusters in this country to treat such damage as particular average. The Court expressly declared the practice to be at variance with the law applicable to such a case, and would assuredly have given judgment in favour of the plaintiffs, had not the latter by the terms of the bill of lading expressly agreed to make the usage a part of the contract. "If," says Mr. Justice Quain, in delivering the judgment of the Court, "the present case depended wholly on the common law applicable to general average, we think the plaintiffs would be entitled to recover." But, "as the parties have agreed to make the custom a part of their contract, the case must be decided according to the custom, and the result is that our judgment must be for the defendant." To which the learned judge added: "It is to be hoped, however, that in future there will be no difference between law and custom on this point, and that average adjusters will act on the law as now declared, and that bills of lading will also be framed in accordance with it." There being no such term in the present contract, I see no reason for treating the practice with which we have to deal with more consideration than the practice then before the Court received at its hands in that case.

Walthew v. *Mavrojani* (1) was a case altogether differing from the present. It was a case of stranding; and the question was whether expenses incurred for the purpose of getting the ship off, after the goods had been taken out of her and removed to a place of safety, could be made the subject of general average, and it was held that they could not. But of the six judges who so held in the Exchequer Chamber, Bovill, C.J., Mellor, Montague Smith, Lush, and Hannen, JJ., base their judgment on the ground that, while it was essential to the owner of the ship to get his ship off, so as to be able to resume the voyage and earn the freight, it was indifferent to the goods owner, the goods being in safety, whether they were carried on in the same ship or in another. "It is not

(1) Law Rep. 5 Ex. 116.

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shewn," says the Chief Justice, "that any advantage resulted to the goods from their being carried on in that ship rather than any other." "It was indifferent to the owners of the cargo whether the ship floated or not, and there was therefore no sacrifice made, or extraordinary expense incurred, to save both ship and cargo, or for the common benefit of both." "I draw the inference," says Mr. Justice Montague Smith, "that it was indifferent to the owner whether the goods went forward to England in the *Southern Belle* —the ship in question—or any other." Mr. Justice Hannen says: "It is unjust that expenses incurred by the owner of the ship for the benefit of all should be borne by him alone. But the expenses in question were not such, for it is indifferent to the owner of goods whether his goods are taken on by the same ship, except where they would not otherwise be carried on at all, or only at a greater expense." Even Mr. Justice Brett, who appears to have been disposed to lay down the rule more generally, treats these expenses as incurred solely for the benefit of the shipowner.

In like manner, in the earlier case of *Hallett* v. *Wigram* (1), in which a claim for contribution had been made where part of the cargo had been sold to raise money for the repair of the ship, which had put back by reason of damage sustained by ordinary perils of the sea, Wilde, C.J., in giving judgment, says: "It is in respect only of the incapacity of the particular ship to carry the goods forward to their destination that the pleas shew that the cargo was in danger of being wholly lost. It is difficult to see how the repair of the ship could be for the benefit and advantage of the plaintiffs. The plaintiff's goods were of a description not to be deteriorated to any great extent."

These two decisions are no doubt sufficient authority for saying that, according to English law, expenses incurred for the benefit of the ship alone, without any concomitant benefit to the cargo—such as the expense of getting off a stranded vessel after the goods have been discharged, or of repairing a vessel in a port of refuge—in the absence of special circumstances such as were referred to in *Walthew* v. *Mavrojani*, will not give a claim to general average. But they are inapplicable to a case like the present. There is nothing here to shew that the goods could

(1) 9 C. B. 580.

have been sent on in another vessel. And, what is of more importance, the expenses were all incurred in furtherance of the common purpose, and for the benefit of the cargo as well as the ship—of the ship, as an opportunity was thus afforded of repairing it and enabling it to take on the cargo; of the cargo, as it was thus enabled to be carried on to its destination.

I am therefore of opinion that our judgment must be for the plaintiffs; and as my Brother Mellor concurs in this view and in the reasons on which it is founded, there will be judgment for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Field, Roscoe, & Co., for Bateson & Co.*
Solicitors for defendants: *Parker & Clarke.*

THE QUEEN *v.* THE VICAR AND CHURCHWARDENS OF TOTTENHAM.

March 31.

Vestry—58 *Geo.* 3, *c.* 69, *s.* 1—*Hour for holding Meetings*—*Power of Vicar*—*Control of Parishioners.*

The vicar and churchwardens of a parish are not bound to insert in the notice paper of the next vestry meeting notice of a motion by a ratepayer for changing the hours for holding meetings of the vestry in the parish.

RULE calling on the Rev. A. Wilson, vicar of Tottenham, Middlesex, and the churchwardens of the parish, to shew cause why a mandamus should not issue commanding them to cause notice of a motion (which was set out in terms) to be inserted in the notice paper of the next vestry meeting of the parish.

It appeared that on the 23rd of July, 1878, a requisition signed by a number of ratepayers was served upon the churchwardens requesting that notice of the following motion might be inserted on the notice paper for the next vestry meeting of the parish.

"To be moved by Mr. Edward Maitland, that the hour for holding the meetings of the vestry of the parish of Tottenham be seven o'clock in the evening."

The churchwardens, in reply, wrote refusing to publish this notice, on the ground that the vicar, and not the parishioners,

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had the right of fixing the day and hour for holding the vestry and regulating its proceedings. It appeared that the motion was in consequence of the vicar having changed the hour of the vestry meetings from 7 P.M. to 11 A.M., which he stated in his affidavit he had found to be necessary for the purpose of preserving order at the meetings.

W. Phillimore, shewed cause. It is no part of the duty of the vicar to give notice of the proposed resolution, for it is one which the vestry has no power to pass, and which, if passed, must be useless or inoperative. The Act 58 Geo. 3, c. 69, s. 1, recognises the right of the vicar to preside over the vestry, and requires notice to be given of the place and hour of holding the vestry, and the special purpose thereof, in the parish church after service on Sunday, and by affixing it on the church door. By 7 Wm. 4, and 1 Vict. c. 45, the notice in the church is abolished, leaving it necessary to publish the requisite notice on the door, which is to be signed by the vicar, curate, churchwardens, or overseers. So that for anything that appears to the contrary, it is for the vicar and churchwardens to supply the particulars required in the notice. *Rex* v. *Archdeacon of Chester* (1) decided that notice of a meeting for the election of churchwardens, which stated that if a poll were demanded it would be held at the town hall, was good, and that the vicar as chairman might at the meeting upon a poll being demanded, adjourn the election to the town hall. Lord Denman said: "Those who summon a meeting of this kind must necessarily lay down some order for the proceedings." *Reg.* v. *D'Oyley* (2) recognises the right of the vicar to preside as chairman, to adjourn the meeting, and grant a poll at a time and at a place in the parish which he may deem most convenient. The vestry meetings are ordinarily held on the freehold of the vicar, and if the parishioners possessed the power of regulating the time of meeting they might fix an hour which would clash with the services and special duties of the vicar. If, then, it is for the incumbent to fix the time of meeting, it would be idle for the vestry to discuss the question of when it should be held. It may be admitted that the incumbent is bound to insert proper

(1) 1 Ad. & E. 342. (2) 12 Ad. & E. 139.

and legal notices in the agenda, but this notice is of a different character.

A. Charles, Q.C. (*Cunningham*, with him), in support of the rule. The notice in question was a legal and proper one, and ought to have been inserted in the agenda of the vestry meeting. The statutes referred to confer no express authority on the incumbent as to fixing the time of meeting, and in the absence of any such provision it is right that the time should be appointed by the parishioners at large. A vestry is a meeting of parishioners for the despatch of the business of the parish: Wills's Vestryman's Guide, p. 1; Steer's Parish Law, p. 283; *Stoughton* v. *Reynolds* (1); and it is reasonable that they should have the power of fixing the time of their meetings.

[COCKBURN, C.J. The vestry is not a permanent legislative body. Each vestry is a new assembly, and cannot determine when the next meeting shall be held.]

The vicar and churchwardens exercise their authority as agents for the parishioners, and a parishioner can give notice between one vestry and another of any business he may wish to bring forward.

[MELLOR, J. Any one present at a vestry meeting might move an adjournment till the evening, but it is a different thing to propose a restriction on the governing body with respect to calling the meeting together.]

The vicar in the present case assumes the right of preventing any motion as to changing the time from coming before the vestry, for it is essential that the special purpose intended to be discussed should be stated in the notice: *Smith* v. *Deighton*. (2) It would seem that notice of a vestry meeting may be given by a private parishioner: *Butt* v. *Fellowes*. (3)

COCKBURN, C.J. I think this rule must be discharged. It is, of course, necessary that a vestry meeting should be duly summoned, but it is not necessary for the present purpose to say whether notice ought to be given by the incumbent or churchwardens, or by both. Application was made to the vicar and churchwardens

(1) 2 Str. 1045. (2) 8 Moo. P. C. 179.
(3) 3 Curt. 680, p. 696.

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of this parish to put upon the notice paper notice of a motion "that the hour for holding the meetings of the vestry be seven o'clock in the evening," and we are asked to issue a mandamus to compel them to accede to this application. I think that the mandamus cannot be granted. By law it rests with the vicar or churchwardens, or both, to summon vestry meetings, and whoever be that authority it must clearly rest with him or them to determine the hour of meeting. I quite agree with what my Brother Mellor has said, that after the vestry has met, any ratepayer present might move that the meeting be adjourned till the evening, but we are not asked to compel the vicar to allow any such motion to be put. What we are asked is to compel him to convene a meeting for the purpose of fixing the hours of holding future meetings. This would practically be an indirect mode of depriving the vicar of the authority vested in him by law, so that no ground for our interference has been shewn.

MELLOR, J. I am of the same opinion. Mr. Charles has admitted that when a vestry meeting has been dissolved it cannot in any way be considered to exist for the purpose of controlling any future meeting, but that any future meeting must be the creation of a fresh notice. Each meeting is a new and distinct one, and it may be composed of an entirely different body of persons.

Rule discharged.

Solicitors for prosecution: *Peckham & Co.*
Solicitors for respondents: *Brooks, Jenkins, & Co.*

IN THE MATTER OF KING *v.* HAWKESWORTH.

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May 15.

Liverpool Passage Court—Costs—Action for Slander—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 91—*Rules and Orders of Judicature Act,* 1875—16 *Vict. c. xxi. ss.* 53, 54.

Under the Judicature Act, 1873, s. 91, which enacts "that the several rules of law enacted and declared in this Act shall be in force and receive effect in all courts whatsoever in England so far as the matters to which such rules relate shall be respectively cognizable by such courts," Order LV. (under the Judicature Act, 1875) is applied to proceedings in the Court of Passage of the borough of Liverpool; and a plaintiff who recovers a shilling damages in an action for slander tried by a jury in that court is entitled to his costs, unless the judge before whom the action was tried has ordered otherwise.

RULE calling on J. Rayner, Esq., registrar of the Court of Passage of the borough of Liverpool, to shew cause why a mandamus should not issue commanding him to tax the plaintiff's costs in an action of *King* v. *Hawkesworth* tried in that court.

It appeared that the action was for slander, and having been tried by a jury there was a verdict for the plaintiff, damages one shilling. Application was made to the assessor on behalf of the defendant for a certificate to deprive the plaintiff of costs (if entitled to them), but he refused to make any order, saying that he should allow the law to take its course. The plaintiff then applied to the registrar to tax his costs, but the registrar assuming that 21 Jac. 1, c. 16, was, as regards the Passage Court, still in force, refused to tax them, on the ground that under this Act the plaintiff was only entitled to as much costs as damages, that is, one shilling. The practice of the Passage Court is regulated by the local Acts 4 & 5 Wm. 4, c. xcii. s. 10, and 16 Vict. c. xxi. (1), and the assessor under s. 52 of the latter Act had,

(1) By 4 & 5 Wm. 4, c. xcii. s. 10, whenever in any action brought in the Court of Passage the debt or damages does not exceed 40*s.* it shall be lawful for the Court, either upon the trial or afterwards, upon the application of the defendant to certify that such debt or damages does not exceed 40*s.*, and after such certificate the plaintiff shall not be entitled to recover from the defendant in the same any costs of suit.

By the Liverpool Court of Passage Procedure Act, 1853 (16 Vict. c. xxi.), s. 52, the powers conferred by ss. 223, 224, 225, of the Common Law Procedure Act, 1852, may be exercised so far as they apply to the Court by the assessor of the court with the

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with the consent of three judges of the High Court of Justice, adopted the rules and orders of the Judicature Act, 1875.

McConnell and *Byrth*, shewed cause. Assuming that the power conferred by s. 223 of the Common Law Procedure Act, 1852, may be exercised by the Judge of the Passage Court, this is merely a power to make rules respecting the practice of the Court. It does not include a power to make a rule which enables the judge to deprive the successful party of his costs. The right to costs is matter of express statutory enactment and cannot be regarded as part of the practice of a Court. The rules and orders of the Judicature Act, 1875, were intended only to govern the procedure in the superior Courts. If it had been intended to apply them to inferior Courts there would have been some express provision on the subject.

[It was also argued that the mandamus ought not to have been directed to the registrar, but the ground on which the Court

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approbation of one of the judges of the superior courts of common law at Westminster.

Sect. 53: In any case not expressly provided for herein, or by the rules regulating the practice of the Court, the general principles of practice in the superior courts of common law at Westminster shall and may be adopted and applied to actions and proceedings in the said court.

By the Common Law Procedure Act, 1852, s. 223: "It shall be lawful for the judges of the said courts, &c. . . . from time to time to make all such general rules and orders for the effectual execution of this Act, and the intention and object hereof, and for fixing the costs to be allowed for and in respect of the matters herein contained . . . .; and for the purpose of enforcing uniformity of practice in the allowance of costs in the said courts . . . . as in their judgment shall be necessary and proper."

By the Judicature Act, 1873, s. 91: "The several rules of law enacted and declared by this Act shall be in force and receive effect in all courts whatsoever in England, so far as the matter to which such rules relate shall be respectively cognizable by such courts."

By the Judicature Act, 1875, s. 1: "This Act shall, so far as is consistent with the tenor thereof, be construed as one with the Supreme Court of Judicature Act, 1873."

Order LV.: "Subject to the provisions of the Act, the cost of and incident to all proceedings in the High Court shall be in the discretion of the Court: Provided that where any action or issue is tried by a jury the costs shall follow the event, unless upon application made at the trial for good cause shewn the judge before whom such action or issue is tried, or the Court, shall otherwise order."

gave their decision makes it unnecessary to notice the point further.]

French, in support of the rule. The substantial question which has been raised for the consideration of the Court is whether Order LV. is a rule of law, or whether it is a rule of practice, and might therefore have been adopted as part of the procedure of the Passage Court under 16 Vict. c. xxi., and the Common Law Procedure Act, 1852, s. 223. But the plaintiff is in this dilemma. Either the rule is a rule of practice, and was therefore properly adopted as part of the procedure of the Passage Court, or it is a rule of law, in which case it is applied to the Passage Court by s. 91, of the Judicature Act, 1873. By s. 1, of the Judicature Act, 1875, the two Acts are to be read as one Act, the effect of which is to make Order LV. a rule of law within the meaning of s. 91, of the Act of 1873, and therefore applicable to all English Courts, including the Passage Court.

COCKBURN, C.J. It is with much regret that I have come to the conclusion that this rule must be made absolute. It is a lamentable thing that any person who in an action for slander recovers such contemptible damages as a shilling, should be able to get his costs, but I think there can be no doubt that s. 91, of the Judicature Act, 1873, applies to actions brought in the Passage Court of Liverpool, and this section is to the effect that the several rules of law enacted in the Act, shall be in force in all Courts in England. Now one of the rules in the schedule to the Judicature Act, 1875, which are substituted for those under the Judicature Act, 1873, is order LV., which provides that where any action is tried by a jury the costs shall follow the event, unless upon application at the trial, the judge on good cause shewn, shall otherwise order. The effect of this rule is that a mere negative proceeding on the part of the judge is not sufficient to deprive the plaintiff of his costs, but it is necessary that there should be some positive act; and this is not proved, for the learned assessor seems only to have said that he should allow the law to take its course. It follows that the plaintiff is entitled to his costs.

With regard to the objection as to the form of the mandamus,

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it is only necessary to say that the registrar is a constituent part of the court, and, for anything that appears to the contrary, is the proper official to whom the mandamus ought to be directed.

MELLOR, J. I am of the same opinion. I share the regret expressed by the Lord Chief Justice at the consequences of our decision, but I think it is the necessary result of s. 91 of the Judicature Act, 1873, which brings in Order LV., and makes it regulate the procedure in the Passage Court. Under Order LV. I think the assessor is the presiding judge who has power to make the order depriving the plaintiff of costs, and inasmuch as he has made no such order the plaintiff is entitled to them.

LUSH, J. I am of the same opinion. I think s. 91 can have no other construction than that which my Lord has stated. Sect. 1 of the Judicature Act, 1875, declares that the Act shall be construed as one with the Judicature Act, 1873, so that the rules contained in the later Act may be taken to be referred to in s. 91 of 1873. The section is not limited to the superior Courts properly so called, but applies generally to all courts in England, and must therefore extend to the Passage Court.

Rule absolute.

Solicitors for plaintiff: *Sydney Mayhew, for Blackhurst & Fretson, Liverpool.*

Solicitors for defendant: *Venn & Son; R. H. Bartlett, Liverpool.*

[IN THE COURT OF APPEAL.]

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Dec. 21.

NUTTER *v.* THE ACCRINGTON LOCAL BOARD OF HEALTH.

Highway—Turnpike Road—"Street," Definition of—Alteration of Level of Street—Damage—Compensation—11 & 12 *Vict. c.* 63, *ss.* 2, 68, 144; 15 & 16 *Vict. c.* 42, *s.* 13; 21 & 22 *Vict. c.* 98, *s.* 41.

By the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 68, streets being highways within the district of a local board shall vest in and be under the management of the board, and the board shall cause all such streets to be levelled, paved, flagged, channelled, altered, and repaired as occasion may require.

By the interpretation clause (s. 2): "The word 'street' shall apply to and include any highway (not being a turnpike road)." By s. 144 compensation shall be made to all persons sustaining any damage by reason of the exercise of the powers of the Act; and in case of dispute as to amount, the same shall be settled by arbitration in the manner provided by the Act.

The footpath of a street which was a highway and also a turnpike road within the district of a local board, was altered by them under an agreement with the turnpike trustees, so as to raise the level of the footpath in front of the house of the plaintiff and cause him damage:—

Held, by Brett and Cotton, L.JJ., reversing the judgment of the Queen's Bench Division, Bramwell, L.J., dissenting, that a street which is also a turnpike road is not excluded by s. 2 from the operation of ss. 68 and 144, and that the plaintiff was therefore entitled to recover compensation from the board in the manner prescribed by s. 144.

SPECIAL CASE stated under judge's order.

The plaintiff was in September, 1864, and is now, the owner of a house and land in the town of Accrington, adjacent to the Whalley Road.

The defendants became in 1857 the local board of health, and are the urban sanitary authority for the town and district of Accrington, under the provisions of the Public Health Act, 1848, and the other Acts therewith incorporated.

The house and land of the plaintiff and that part of the Whalley Road adjacent are within the district of the local board.

By 29 Geo. 3, c. 107, a turnpike trust was established, which included the Whalley Road, part of which was within and some part without the district of the Accrington Local Board, and such trust expired in 1874, up to which time toll-gates were maintained, and tolls taken at various parts of the road.

There had always, for fifty years at least, been a footway

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immediately adjacent to the plaintiff's premises, and previous to the establishment of the local board the turnpike trustees had maintained and from time to time repaired the footway and the carriage-way both within and without the local board district, with the exception of the pavement within the local board district. The carriage-way adjacent to the plaintiff's property had not been paved at the time the footway was raised as hereinafter set forth.

After the establishment of a local board, and previous to the year 1871, by agreement between the local board and the turnpike trustees, the local board sometimes provided kerb stones for the footpath of such part of the Whalley Road as was within their district, and the trustees put them in, and the trustees did everything that was done for the maintenance and repair of the carriage-way.

In the year 1864 the trustees communicated to the defendants their intention of erecting a toll-bar in another turnpike road in the township of Accrington, subject to the same trust; and afterwards, in February, 1865, the defendants, in order to induce the trustees not to erect such toll-bar, passed the following resolution, which was in due course communicated to the trustees, and accepted by them: "Resolved, that the proposal made to a deputation from this board by the trustees of the turnpike road at their meeting of September 15th last to the following effect:—'That the local board should take upon themselves the future repair of such parts of the turnpike road within their district as are already and may be hereafter pitched with stone and all such parts of the footpaths as are already or may hereafter be flagged at least a yard in width, and that other parts of the road and footpaths shall be continued to be repaired by the trust,' be accepted by this board."

That part of the footpath immediately adjoining the plaintiff's land was flagged more than a yard in width previous to 1864.

Previous to 1871 a further agreement had been entered into between the local board and the trustees, whereby, amongst other things, the trustees undertook to raise the level of the carriage-way at a part of the road immediately opposite the house and land of the plaintiff, and the defendants on their part undertook to raise the footpath to a corresponding height.

In or about the month of May, 1871, in execution of this agreement, the trustees raised the level of the carriage-way opposite the plaintiff's house and land, and the defendants raised the footpath to a corresponding height.

The plaintiff sustained damage within the meaning of s. 144 of the Public Health Act, 1848, by raising of the footway by the defendants, and such damage was the necessary and direct result of the raising of the footpath, and not of any negligence of the defendants in the execution of the work.

In October, 1874, proceedings against the defendants were commenced by the plaintiff to obtain compensation under the provisions of the Public Health Act, 1848; and after all due preliminiaries required by the Act were performed, were carried on ex parte by the plaintiff, and on the 19th of January, 1875, an award was published, whereby the defendants were ordered to pay to the plaintiff 112*l.* compensation for the damage she had sustained, and a further sum of 111*l.* 5*s.* 8*d.* taxed costs.

The award was in all respects a good and valid award, provided that the damage sustained by the plaintiff was a proper subject for arbitration and compensation within the meaning of the Public Health Act, 1848, and the other Acts therewith incorporated.

Neither of the sums of 112*l.* and 111*l.* 5*s.* 8*d.* have been paid by the defendants to the plaintiff.

That part of Whalley Road which is adjacent to plaintiff's house and land was at the time the footpath was raised as stated and is a street, unless the Court find, first, that it was a turnpike road; and, secondly, rule as a matter of law that a turnpike road is excepted from the definition of "street," within the true intent and meaning of the Public Health Act, 1848, and other Acts incorporated therewith.

The questions for the opinion of the Court were: First, whether the claim of the plaintiff was a claim within the true intent and meaning of the Public Health Act, 1848 (1), and other Acts incor-

(1) 11 & 12 Vict. c. 63 (Public Health Act, 1848):—

Sect. 2: "The word 'street' shall apply to and include any highway (not being a turnpike road) and any road, public bridge (not being a county bridge), lane, footway, square, court, alley, or passage within the limits of any district."

Sect. 68: "That all present and future streets being, or which at any time become, highways within any

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porated therewith. Secondly, whether the arbitrator had authority to make such award, and whether the award was good and binding upon the defendants.

Forbes, for the plaintiff.

C. Crompton, for the defendants.

COCKBURN, C.J. I regret that we must give our judgment for the defendants. I very much doubt whether the 41st section of this Act of 1858 (21 & 22 Vict. c. 98) has any application to such a case at all, and without that it is clear that the trustees and the Board of Health had no authority to make the agreement by virtue of which and under which the defendants raised the level of the footpath. They have authority by agreement with the trustees of the turnpike road, or other persons liable to repair the highways, to take upon themselves the maintenance and repair of the road or any part of the road; but I doubt extremely whether that can be so interpreted as to be held to

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district, and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof by any surveyor of highways, or by any person serving the office of surveyor of highways, shall vest in and be under the management and control of the said local board of health; and the said local board shall from time to time cause all such streets to be levelled, paved, flagged, channelled, altered, or repaired, as and when occasion may require; and they may from time to time cause the soil of any such street to be raised, lowered, or altered as they may think fit, and place and keep in repair fences and posts for the safety of foot passengers."

Sect. 144: "That full compensation shall be made out of the general or special district rates to be levied under this Act to all persons sustaining any damage by reason of the exercise of any of the powers of this Act; and in case of dispute as to amount the same shall be settled by arbitration in the manner provided by this Act. . . ."

15 & 16 Vict. c. 42, s. 13: "The term 'highway' in the sections of the Public Health Act, 1848, numbered respectively 68 and 69 . . . shall mean any highway repairable by the inhabitants at large."

21 & 22 Vict. c. 98, s. 41: "It shall be lawful for any local board, by agreement with the trustees of any turnpike road, or with any corporation or person liable to repair any street or road, or any part thereof . . . to take upon themselves the maintenance, repair, cleansing, or watering of any such street or road, or any part thereof . . . on such terms as the local board and the trustees, or corporation, or person, or surveyor aforesaid may agree upon between themselves."

The above Acts have been repealed by the Public Health Act, 1875 (38 & 39 Vict. c. 55), and re-enacted by ss. 4, 148, & 149 of the same Act.

mean that they may divide the road longitudinally, and that one part of the road is to be repaired by one party and the other part of the road by the other, or that part of the highway which is set apart for the passage of vehicles and horses and so forth may be repaired by one of these authorities, and that the footpath or highway for foot-passengers may be repaired by the other. My judgment proceeds more immediately upon the other ground, viz. that the case does not come within the 144th section of the first Act, the Act of 1848, which expressly excludes turnpike roads. With regard to other roads it placed them in the local authority, but it makes that authority liable to make compensation where, in the exercise of the power vested in them with reference to streets and highways, they do any damage or cause any injury to individuals. That has reference to ways which are not turnpike highways, and it expressly excludes turnpike highways. Then in the Act of 1858 (21 & 22 Vict. c. 98) the local board is authorized to enter into agreements with trustees of turnpike roads, or other persons liable to repair highways, to take upon themselves the maintenance and repair of such highways. I think the powers and liabilities they may take upon themselves under such agreements can only be such as are coextensive with those of the person or authority whose powers and liabilities they accept and which are transferred to them. This brings me to the question whether, supposing the trustees of the turnpike road had done what in the present instance the defendants did, they would have been liable to give compensation. It is not necessary to decide the question, because one thing is clear—the Act does not give any summary method of obtaining compensation if compensation is to be made.

If they are entitled to do what they did in the exercise of their powers, there is no provision for compensation. If they do it wrongfully redress would be had by action. So here they act as delegates of the authority of the trustees. The local board did something which the trustees were not empowered to do, and which they, therefore, acting with that delegated authority were not empowered to do, and the remedy against them would be the same as against the trustees. Whether it would lie it is not necessary to decide.

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On the question whether the Act of 1848 is applicable to this case, very much to my regret I say it is not.

MELLOR, J. I am of the same opinion, and I rather think I have a stronger view than my Lord has upon the first point to which he referred.

My impression is that under the 41st section they cannot make an agreement to divide the road into longitudinal sections. Turnpike roads were excluded from the operations of the original Board of Health Act. This was a turnpike road; but there might be and probably would be a convenience to give power to turnpike trustees and local boards to agree to repair a certain length of road, taking the whole width between the two boundaries of the road as the subject-matter of the transfer; because then it might be more conveniently repaired and kept in condition by the Board of Health than by the trustees, but I do not think it was intended to introduce double jurisdiction on the same breadth of highway. Therefore I think strongly that it was not within the powers of the board to make the arrangement which was come to.

On the other part of the case it is unnecessary to say more than that I regret that the plaintiff is to lose the fruits of the litigation by reason of the defendant's setting up such a defence after this lapse of time.

The plaintiff appealed.

Gully, Q.C., and *Forbes*, for the plaintiff. First. The local board had power to raise this road, for it was a "street," being a highway, and therefore vested in them, and they might cause the soil to be raised under 11 & 12 Vict. c. 63 (Public Health Act 1848), s. 68. They, indeed, rely on the fact that the street was also a turnpike road, and on the interpretation clause (s. 2), enacting that "the word street shall apply to and include any highway (not being a turnpike road)." This way was however a street in common parlance, viz. a thoroughfare, with houses on either side. Whether it was a street or not is a question of fact: *Reg.* v. *Fullford* (1), and has been found in the affirmative. And as was said in that case by Blackburn, J.: "The interpretation

(1) 33 L. J. (M.C.) 122. 10 Jur. N. S. 523.

clause referred to does not exclude the ordinary meaning of 'street,' though it may include other meanings. Would this road necessarily cease to be a street because it became a turnpike road?"

Secondly. Even if not a "street" within s. 68 of the Public Health Act, 1848, the board had power under the Local Government Act, 1858 (21 & 22 Vict. c. 98), s. 41, by agreement with the turnpike trustees to take upon themselves the "maintenance, repair, cleansing, or watering" of it.

[BRAMWELL, L.J. What power had the trustees to raise the road?

BRETT, L.J. Maintenance must mean keeping it up as it is; could they level a hilly road?]

By 9 Geo. 4, c. 77, s. 9, the trustees of any turnpike road are empowered to "make, divert, shorten, vary, alter, and improve the course or path of any of the several and respective roads under their care and management," and under this clause the trustees are authorized to lower hills and raise hollows; but the trustees are not liable to consequential injury resulting from an act which they are authorized to do: *Boulton* v. *Crowther*. (1) The trustees of the turnpike road could have affected the alteration, and without paying compensation; if so they could authorize the local board to alter the road under s. 41 of the Local Government Act, 1858, but by s. 4 the provisions of the Public Health Act, 1848, apply, which by s. 144 entitles the plaintiff to compensation.

C. Crompton, for the defendants. If the street vested in the local board the turnpike trustees had no power over it. But 11 & 12 Vict. c. 63, s. 68, does not vest it in them. Being a turnpike road it is excluded from the definition of the word "street" in s. 2.

[BRETT, L.J. By which, according to your argument, that which was a street ceases to be so.]

It does: for by 15 & 16 Vict. c. 42, s. 13, "the term 'highway' in the sections of the Public Health Act, 1848, numbered respectively 68 and 69, shall mean any highway repairable by the inhabitants at large." The intention of the legislature was that

(1) 2 B. & C. 703.

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if the burden of repair was not on the inhabitants the highway should not vest in the local board: *Reg.* v. *Fullford* (1) was a decision on a later Act. If 11 & 12 Vict. c. 63, s. 68, vests the road in a local board, then s. 41 of the Local Government Act, 1858, empowering them to agree with the trustees and to take upon themselves the maintenance of the road is superfluous. That s. 68 of the Public Health Act, 1848, should oust the trustees could never have been intended.

Secondly. As to the effect of s. 41, and the agreement under it, the section only authorizes an agreement as to the "maintenance and repair, cleansing or watering" of the road, and not the raising or alteration of it. Moreover, although an agreement be made to repair "any street or road, or any part thereof," such part must not be a longitudinal section. The Court below so held. Much inconvenience would arise if a part on one side of the medium filum viæ were repairable by the board and the part on the other side by the trustees. For instance, the board might raise the footpath above the road, or the trustees raise the road above the footpath. The division to make the "part" contemplated by the Act must be transverse. Then, unless the proceedings of the local board were under s. 68 or s. 41, the compensation clause s. 144 of the Public Health Act, 1848, does not apply. If the conduct of the board was ultrà vires, the remedy was not compensation but an action: see *Brine* v. *Great Western Ry. Co.* (2)

[BRETT, L.J. Your argument is that the local board are not liable to make compensation, and if sued can justify under the trustees?]

The argument must go so far, and it is supported by *Ferrar* v. *Commissioners of Sewers of London* (3) where serious injury was done to the premises of the plaintiff by works executed under an Act which did not incorporate or contain any provisions for compensation, and it was therefore held that he was without remedy. This principle was established in *Vaughan* v. *Taff Vale Ry. Co.* (4) There is neither a right of action nor a right to compensation. If there had been a right of action it might have been brought

(1) 33 L. J. (M.C.) 122. 16 Jun 1873
(2) 2 B. & S. 402; 31 L. J. (Q.B.) 101. 8 Jun 1861 610
(3) Law Rep. 4 Ex. 227.
(4) 5 H. & N. 679; 29 L. J. (Ex.) 247. 6 Jun H. S. 879

in 1874. Want of notice of action could not have been relied on as answer.

Gully, Q.C., in reply. The turnpike trust expired in 1874, before these proceedings were taken, so there are no trustees who could be sued for the damage. The defendants are maintaining and keeping up the road. There was therefore a cause of damage on which the arbitrator could adjudicate. Then 15 & 16 Vict. c. 42, s. 13, was only intended to set at rest a question whether s. 68 of the Public Health Act, 1848, included roads merely dedicated to and used by the public but not adopted by the parish. Sect. 68 leaves to the trustees the means of collecting tolls, and s. 41 of the Local Government Act, 1858, was a mere corollary enabling the local board to take some parts of rural roads, and by agreement with the trustees to relieve towns of toll gates. A footpath or a part of a road divided in any direction may be taken under s. 41. [He cited also *Reg.* v. *Trustees of the Oxford and Witney Turnpike Roads.* (1)]

Cur. adv. vult.

Dec. 21, 1878. The following judgments were delivered:—

COTTON, L.J. This is an action to enforce an award, ascertaining the amount of compensation payable to the plaintiff in consequence of certain alterations in a road near her house done by the Accrington Local Board of Health, and the question raised on this appeal is, whether or no the matters in respect of which the plaintiff complains were done under the powers of the local board, so as to entitle the plaintiff to compensation under s. 144 of the Public Health Act of 1848.

The facts are these. An arrangement was made between the local board and the trustees of the turnpike road, part of which was the place where the act complained of was done, that control of the road should be divided between them longitudinally; that is to say, that one body should retain the footpath and the other the carriage-way; and the local board altered the level of that part of the road of which they took the charge. I may at once here dispose of a question which appears to have been raised in the Court below, that although there was power, given by an Act

(1) 12 Ad. & E. 427.

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of Parliament (21 & 22 Vict. c. 98, s. 41) to the local board to make arrangements with turnpike trustees to take charge of a definite portion of the turnpike road, this could not be exercised by one body taking the centre of the road and the other keeping the side of it, but that it must be exercised by one party taking a portion of the road up to a particular point and the other taking the remainder. I cannot accede to this objection, for in my opinion it is not necessary that the local board and the turnpike trustees should divide the road by a line drawn at right angles to the centre line. In my opinion they may divide it in any reasonable way which they think fit to adopt. The real question is whether or no the place where the alterations were made by the Accrington Local Board was part of a street vested in them under s. 68 of the Public Health Act of 1848, by which "all present and future streets being, or which at any time become, highways within any district, and the pavements, stones, and other materials thereof, and all buildings, implements, and other things shall vest in and be under the management and control of the said local board; and the said local board shall from time to time cause all such streets to be levelled, paved, flagged, channelled, altered and repaired, as occasion may require." The local board did, in fact, alter this street in front of the plaintiff's house by altering the level. It was argued that although in other respects the place where this was done was a street, yet it was not a "street" within the meaning of s. 68, on the ground that nothing is a street within that section if it is part of a turnpike road, and for that purpose reference was made to the interpretation clause which provides as follows: "The word 'street' shall apply to and include any highway (not being a turnpike road), and any road, public bridge (not being a county bridge), lane, footway, square, court, alley, passage, whether a thoroughfare or not; and the parts of any such highway road, bridge, lane, footway, square, court, alley, or passage within the limits of any district." It was argued that, looking to the terms of this enactment, even if the place in question were a street, it is part of a turnpike road, and therefore is not a street within s. 68. My opinion is the contrary. The interpretation clause is not restrictive. It does not say that the word "street" shall be confined to any highway not being

a turnpike-road, but that it shall "apply to and include any highway not being a turnpike road," &c. That is enlarging, not restricting the meaning of "street," and in my opinion, as I read these words, the place in question is a street; that is to say, that which, independently of the Act of Parliament, in ordinary language is properly a street does not cease to be so because it is part of a turnpike road. It is very true that, independently of the interpretation clause, there may be sufficient in the Act to shew that its provisions relative to streets cannot apply to what is part of a turnpike road even though it is a street. But in my opinion there is nothing in the Act sufficient thus to restrict the effect of its enactments as to streets. There may be some little difficulty in consequence of the street or a portion of the street, over which the turnpike trustees have certainly some powers, being vested in the local board under the powers given by the Act of Parliament; but that is not, in my opinion, a sufficient inconvenience to prevent what would otherwise be their meaning being given to the words. It must be remembered that a subsequent Act of Parliament was passed to which I have already referred (21 & 22 Vict. c. 98, s. 41), enabling the trustees of the turnpike road and the local board to make arrangements as to the management and care of particular parts of the street, and in my opinion that Act of Parliament was passed for the express purpose of preventing any difficulty which might arise under this Act of Parliament in consequence of a street, being part of a turnpike road, being vested in the local board with certain powers; while the turnpike trustees still had under their Act certain powers over the street. It gives, therefore, a right to the turnpike trustees and the local board to make arrangements by which the local board shall undertake the entire charge of the management of the street, including that which the turnpike trustees formerly had. In my opinion, therefore, this was a street within the meaning of s. 68 of the Public Health Act, 1848, and the plaintiff is entitled to compensation.

It was also argued that the amount awarded was excessive. With that we are not concerned. The local board thought right not to appear, trusting that there was no power to award compensation. In my opinion that was wrong, and having taken that

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course they cannot complain that the amount was excessive. We have nothing to do with the amount, whatever it is. We have only to give our opinion whether the act complained of was done under the powers given by the Act to the local board, and in my opinion it was.

BRETT, L.J. If this way had not been a turnpike road, the facts would have brought it within the definition of "street;" and I think the fact of this being a turnpike road does not prevent it being a street. There seems to me to be no inconsistency in saying that a turnpike road is a street, either independently of the statute or within the terms of the statute; and this way, therefore, being a street was vested in the local authorities to the extent we stated in another case the other day. (1) Whatever might be the obligation of the turnpike trustees to keep the roadway in repair, the local board might alter it. They did alter it, and in so doing they were assuming to exercise, and I think they were exercising, the powers of the Act. I think, therefore, that any injury done to the plaintiff was the subject-matter of compensation, and that compensation was rightly awarded for it.

I therefore agree with Cotton, L.J., that the judgment of the Court below ought to be reversed, and with costs.

BRAMWELL, L.J. The question in this case turns upon s. 68 of the Public Health Act, 1848, which says "that all present and future streets" may be altered by the local board; then it is said that the word "street" in the interpretation clause (s. 2), includes not only the things there enumerated but everything which is a street. It enacts, "the word 'street' shall apply to and include any highway (not being a turnpike road) and any road, public bridge (not being a county bridge), lane, footway, square, court, alley, passage, whether a thoroughfare or not, and the parts of any such highway, bridge, lane, footway, square, court, alley, or passage, within the limits of any district." It is said that this interpretation does not necessarily exclude a turnpike road; that

(1) *Coverdale* v. *Charlton*, ante, 104.

the word "street" shall mean what is actually a street; that the interpretation is not the whole of the meaning of the word "street." Then this consequence would follow, that we are not to hold that this interpretation clause is exclusive. There is one interpretation clause which says, "words importing the singular number shall include the plural number, and that words importing the plural number shall include the singular number." And if that clause is to be taken in an exclusive sense, the words in the singular would never mean the singular, and the words in the plural would never mean the plural. It is thus clearly an additional interpretation. I read the words here, "the word 'street' shall apply to and include any highway (not being a turnpike road), and any road, public bridge (not being a county bridge)" and so forth. Then it is said that this is a street. So it is. But it is also a turnpike road. The arguments upon the interpretation clause are equally good for either party. Therefore I must consider if there is anything in s. 68 which will enable me to decide what the legislature intended. With great respect to those who are of a different opinion, I cannot but think the clause means, as the Court below held, that a street which is a turnpike road should not be included. See what the words are: "All present and future streets being, or which at any time become, highways within any district, and the pavements, stones, and other materials, thereof, and all buildings, implements, and other things shall vest in and be under the management and control of the said local board, and the said local board shall from time to time cause all such streets to be levelled, paved, flagged, channelled, altered, and repaired as occasion may require." Has that section taken away the management of the turnpike road from the turnpike trustees? I think that is not intended. But it seems to me, that it is speaking of those things where the management is transferred to the local board. It seems to me, therefore, that these words shew that a street, which is a turnpike road, is not included in section 68. As to expressing an opinion upon such a case as this with confidence, I would much rather not express a confident opinion; and I do not think it is a case upon which one can be confident, especially when one hears the contrary opinions that have been expressed. There is one other remark, and that

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is with regard to s. 117, which says the local board are to be surveyors of the highways. Manifestly, that does not include a turnpike road. That is quite certain.

I am, therefore, of opinion, that upon the questions mainly argued before us, the judgment was right and should be affirmed.

But some other points remain. I will just refer to one, because I think it is of some consequence. I am not quite sure that this is not a more substantial question than the Court below thought it. If the acts were done, as indeed they were, and the alteration was made under the powers of the turnpike trustees, I cannot see that any action would be maintainable against the turnpike trustees or those who acted on their behalf. The trustees are empowered under their Act of Parliament, to raise and alter the levels of the road, and it has been held in a case in the Reports of Barnwell and Cresswell (1), that no action lies against the trustees of a turnpike road for acts done bonâ fide and within their jurisdiction. But I am inclined to look upon it as a principle that no action ought to be maintainable. Usually, a person cannot raise or lower a road in front of another man's park-gate, and so leave his park-gate high up in the air or below the level of the road; because any person having the right is not likely to interfere with the road. But supposing that the owner of property adjoining a highway is not the owner of the soil in the highway, I do not think that he has any right by the law of the land, to have the road continued at a particular level. It may be a great inconvenience to him, no doubt, to have the road altered, if he has built with reference to the level of the road; but it may be an inconvenience to the public not to have the level altered, and I do not know that he has any vested right in the road remaining at that level to the inconvenience of all mankind. I am not clear, therefore, that there was not a more meritorious defence in this case than it was supposed by the Court below. If this view is right, then there is no ground for saying that the defendants are continuing and maintaining a wrong which they have committed. If the act was rightly done by the turnpike trustees, the defendants are justified in maintaining it, and I think the judgment of the Court below must be affirmed; but as the other members of the

(1) *Boulton* v. *Crowther*, 2 B. & C. 703.

Court are of a different opinion, the judgment of the Queen's Bench Division must be reversed.

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Judgment reversed.

Solicitors for plaintiff: *Ridsdale, Craddock, & Ridsdale.*
Solicitors for defendants: *Johnson, Weatherall & Co.*

THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY, APPELLANTS; THE GUARDIANS OF LEWISHAM, RESPONDENTS.

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April 26.

Metropolis Management Act, 1855, *ss.* 159, 161—*District Rate—Expenses not incurred for equal Benefit of whole Parish—Equal Pound Rate.*

By the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 158, vestries and district boards are directed from time to time by order to require the overseers of the several parishes within their district to levy the sums which such vestries or district boards may require for defraying the expenses of the execution of the Act, and by s. 159, where it appears to any vestry or district board that all or any part of the expenses for defraying which any sum is by such vestry or board ordered to be levied—have or has not been incurred for the equal benefit of the whole of their parish or district, such vestry or board may by any such order direct the sum or sums necessary for defraying such expenses or any part thereof to be levied in such part, or exempt any part of such parish or district from the levy, or require a less rate to be levied thereon as the circumstances of the case may require.

Held, following *Howell* v. *London Dock Company* (8 E. & B. 212), that a precept to overseers under the above sections for the levy of a rate—which, after stating that the expenses in respect of which it was required were not for the equal benefit of the parish, required the rate to be levied as regards such parts of the parish as consisted of land used as arable, meadow, or pasture land only, or as woodland, orchard, market-garden, hop, herb, flower, fruit, or nursery ground in the proportion of one fourth part only of the net annual value of such land,—was good, although the classes of land so mentioned in the precept did not lie together or form any particular division marked out by metes and bounds, but were scattered through the parish.

On the 1st of January, 1876, a general purpose rate for the parish of Lewisham was made under the Metropolis Management Act, 1855, (1) in which the appellants were rated in respect of

(1) By the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 158, vestries and district boards are directed from time to time by order under their seal to require the overseers of the several parishes within their district to levy the sums which such vestry or district board may require

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their line of railway and land occupied by stations building and appurtenances at 29,498*l.* gross, and 23,088*l.* rateable value.

Upon appeal to the Kent Sessions the rate was confirmed subject to the following case.

The respondents were constituted under a local Act (54 Geo. 3, c. xliii.), for the better management and relief of the poor of the parish of Lewisham, in the county of Kent, and for better assessing and collecting the parochial rates in the said parish. Their powers for the management and relief of the poor were, however, superseded under the General Poor Law Act of 4 & 5 Wm. 4, c. 76, but for the purpose of assessing and collecting parochial rates they are overseers within the meaning of the Metropolis Local Management Acts.

The order or precept upon which the rate so appealed against was levied was as follows:—

"The board of works for the Lewisham district constituted by the Metropolis Management Act, 1855, in pursuance of the provisions of the said Act and of the Acts for amending and ex-

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for defraying the expenses of the execution of the Act.

3. By s. 159, "Where it appears to any vestry or district board that all or any part of the expenses for defraying which any sum is by such vestry or board ordered to be levied have or has been incurred for the special benefit of any particular part of their parish or district or otherwise have or has not been incurred for the equal benefit of the whole of their parish or district such vestry or board may by any such order direct the sum or sums necessary for defraying such expenses or any part thereof to be levied in such part or exempt any part of such parish or district from the levy or require a less rate to be levied thereon as the circumstances of the case may require."

By s. 161, the overseers of the poor of every parish to whom any such order as aforesaid is issued, shall levy the amounts mentioned therein according to the exigency thereof, and shall for that purpose make separate equal pound rates upon their parish, or the part thereof upon which any sum specified in such order is required to be levied in respect of each sum thereby ordered to be levied, that is to say, a separate rate in respect of each sum ordered to be levied for defraying expenses connected with sewage to be called a sewers rate, &c.—and shall make such respective rates of such amount in the pound on the annual value of the property rateable as will in their judgment having regard to all circumstances, be sufficient to raise the sums specified in such order, and such rates shall be levied on the persons and in respect of the property by law rateable to the relief of the poor in the respective parishes, and shall be assessed upon the net annual value of such property ascertained by the rate for the time being for the relief of the poor.

tending the same, hereby order and require the guardians of the poor of the parish of Lewisham to levy within the said parish the sum of 11,524*l.* for the purpose of defraying the expenses already or hereafter to be incurred by the said board in the execution of the said Act or Acts, and to pay the said sum to the London and Westminster Bank, No. 6, Borough High Street, in the borough of Southwark, the treasurers and bankers of the said board, by two equal instalments of 5762*l.* each, the first on the 7th day of February, and the second on the 23rd day of March, 1876. And it appearing to the said board that the expenses in respect of which the said sum of 11,524*l.* is required are not for the equal benefit of the said parish, the said board do further order and require that the rate or rates to be raised in pursuance of this present precept shall as regards all such parts of the said parish as consist of land used as arable, meadow, or pasture land only, or as woodland, orchard, market-garden, hop, herb, flower, fruit, or nursery grounds be assessed and levied in the proportion of one-fourth part only of the net annual value of such land.

"Given under the common seal," &c.

The property of the London, Brighton, and South Coast Railway Company in the parish consisted of the Forest Hill and Sydenham stations, land occupied by station buildings and appurtenances, and land over which their main line of railway passed, and the whole of such property was rated and assessed in the rate at 10*d.* in the pound. No part of such property was land used as arable, meadow, or pasture land only, or as woodland, orchard, market-garden, hop, herb, flower, fruit, or nursery ground.

The parish of Lewisham is very extensive in area, containing in the aggregate about 5500 acres. Of this area a very considerable proportion is covered with houses; about 3000 acres are lands under cultivation, and fall under the classes of land mentioned in the precept. There is also land in the parish used in other ways, and rated at the higher rate. The 3000 acres do not lie together, but are scattered through the parish. The rateable value of the 3000 acres, according to the valuation list, amounts to about 11,000*l.* The total rateable value of property in the parish amounts to 324,009*l.*

Throughout the parish, all property, wheresoever situate, which

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consisted of land used as arable, meadow, or pasture land only, or as woodland, orchard, market garden, hop, herb, flower, fruit, or nursery ground, was rated or assessed in the rate at $2\frac{1}{2}d.$ in the pound, and all other property was rated or assessed at $10d.$ in the pound upon the net annual value of such property respectively as ascertained by the rate for the time being for the relief of the poor.

It was contended on the part of the appellants, first, that the precept of the Lewisham district board of works was bad in law, inasmuch as the district board have no power, under the 159th section of the Metropolis Management Act, 1855, or otherwise, to order the said rate to be levied in the manner directed by the precept, and can only exempt or order a less rate to be levied upon any particular part of a parish described and marked out by metes and bounds; secondly, that the rate was bad in law inasmuch as it was not an equal pound rate as required by the "Metropolis Management Act, 1855," s. 161.

The questions for the Court are—

1. Whether the rate was bad in law.

2. Whether, if the rate was good in law, such property of the appellants as consists of land used for their railway ought not to be rated at the lower rate.

F. M. White, Q.C. (*Paine,* with him), for the respondents. Sect. 159 gives the vestry or district board a power to rate land of a particular description wherever situate in the parish upon a lower scale. *Howell* v. *London Dock Co.* (1) is in point. There the question was raised whether, in respect of so much of a similar rate as was required for paving expenses, the premises of a dock company were entitled to any exemption. The Court held that the company were entitled to exemption in respect of profits not immediately connected with any use of paved streets; and it is not suggested that the exemption ought to be confined to any particular part of the parish. In *Reg.* v. *Great Western Ry. Co.* (2) Erle, J., appears to have protested against *Howell* v. *London Dock Co.* (1) being cited as an authority. But this does not appear

(1) 8 E. & B. 212; 27 L. J. (M.C.) 177. 4 Jur. N.S. 205

(2) E. B. & E. 600, at p. 613; 28 L. J. (M.C.) 59, at p. 64. 5 Jur. N.S. 386.

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to have been in consequence of any dissatisfaction with principles laid down in the previous case, but only because of some informality in the mode in which the case was brought before the Court.

Oppenheim, for the appellants. *Howell* v. *London Dock Co.* (1) is distinguishable. There the Court proceeded upon the ground that before 18 & 19 Vict. c. 120, the paving rate had been apportioned upon the property according to the benefit derived from the pavement, and that the Act did not intend to depart from this principle. It may be conceded that the vestry or district board have a discretion to exempt part of the parish from the rate, but there is no power to exempt any particular description of property. Sect. 161 requires the amounts referred to in the precept to be levied by equal pound rates, without any proviso for rating property upon a different footing according to its description, and the course adopted by the district board is wholly inconsistent with this section.

[COCKBURN, C.J. Are we not bound to treat *Howell* v. *London Dock Co.* (1) as a binding decision?]

It appears to have been regarded by the Court as a mere expression of opinion, which they did not wish to be treated as an authority.

COCKBURN, C.J. I think this appeal must be dismissed and the order of sessions confirmed. I was at first disposed to come to the opposite conclusion, but it seems to me that *Howell* v. *London Dock Co.* (1) is in point, and that there is nothing to shew that this case is not to be regarded as a binding authority. There a dock company claimed exemption for their premises in respect of so much of the rate as was required for paving expenses, and the Court held that the vestry in levying the rate ought to distinguish between such parts of the property of the dock company as profited from the pavement and such as did not. The case is therefore an authority for rating upon a lower scale the particular description of property mentioned in the case, without regard to whether it forms a particular section of the parish or not. I think it is impossible for us to overrule this decision, and it must

(1) 8 E. & B. 212; 27 L. J. (M.C.) 177.

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be observed that the construction which it puts upon the statute is that which is most consonant to equity and right. The legislature, if dissatisfied with this interpretation, can interfere by amending the Act.

LOPES, J. I am of the same opinion. If there had been no decision upon the subject, I should have had some doubt as to the construction to be put upon s. 159. But I think *Howell* v. *London Dock Co.* (1) is in point.

Judgment for the respondents.

Solicitors for appellants: *Norton, Rose, Norton, & Brewer.*
Solicitor for respondents: *S. Edwards.*

June 10.

BABCOCK AND OTHERS *v.* LAWSON AND ANOTHER.

Sale or Pledge of Goods—Purchaser or Pledgee, Right of Innocent, where Property procured by Vendor or Pledgor by Fraud—Fraud, which of Two Innocent Parties to suffer by—Pledge—Property revested by Pledgee in Pledgor through Fraud of the latter.

The plaintiffs made advances to D. & Sons on the security of certain flour, the following memorandum being signed by D. & Sons: "As security for the due fulfilment on our part of this undertaking, we have warehoused in your name sundry lots of flour, and in consideration of your delivering to us or our order said flour as sold, we further undertake to specifically pay you proceeds of all sales thereof immediately on their receipt." The flour was warehoused in the plaintiffs' name. The defendants subsequently made advances to D. & Sons on the security of a pledge of the flour, in ignorance of the prior transaction with the plaintiffs; and D. & Sons, by a fraudulent representation that they had sold the flour to the defendants, procured from the plaintiffs a delivery order for the flour, which they gave to the defendants. The defendants, in pursuance of the delivery order, obtained possession of the flour, and, the advances made by them not being repaid, sold it. The plaintiffs sued the defendants for the conversion of the flour:—

Held, that (assuming that the plaintiffs had originally a special property in the flour), the intention of the plaintiffs must be taken to have been to revest the whole property in the flour in D. & Sons, in order that they might transfer it to the defendants as purchasers; and that, though the plaintiffs might have revoked the delivery order as being procured by fraud, as long as the flour

(1) 8 E. & B. 212; 27 L. J. (M.C.) 177.

remained in the hands of D. & Sons, yet when the property in the flour had been transferred by D. & Sons to bonâ fide transferees for good consideration, the title of the latter was indefeasible:

Held, also, that of two innocent parties, one of which must suffer, the plaintiffs having enabled D. & Sons to commit the fraud on the defendants, must suffer the consequences, and that, consequently, the action was not maintainable.

SPECIAL CASE stated in an action for conversion of certain sacks of flour. The facts sufficiently appear from the judgment.

May 13. *T. H. James*, for the plaintiffs. The plaintiffs were pledgees of the flour and therefore had a special property in it. The pledgors had no right to the possession of the flour until the debt was paid and could not sue in trover: *Halliday* v. *Holgate* (1); *Cundy* v. *Lindsay*. (2) The plaintiffs parted with the possession of the flour, but they did so for the purposes of a sale not of a pledge, on a fraudulent representation by the pledgors, that they had effected a sale of the flour in conformity with the agreement. They never intended to give up their special property in the flour except for that purpose. There is no evidence of a contract between the plaintiffs and defendants to pass the property, because they were never ad idem. The plaintiffs supposed the defendants to be purchasers, whereas they never intended to purchase. The special property, therefore, remains in the plaintiffs, and they can maintain trover. An action of trover would certainly lie against Denis Daly & Sons by the plaintiffs; and it is therefore submitted, that as the defendants must derive their title from Denis Daly & Sons, it will lie against the defendants. [He also cited *Kingsford* v. *Merry* (3), and *Roberts* v. *Wyatt*. (4)]

Cohen, Q.C. (*Warr*, with him), for the defendants. The test suggested is not a true one. The defendants do not stand in the shoes of Denis Daly & Sons. It is a case for the application of the well known doctrine that where one of two innocent persons must suffer by the fraud of a third, the person who has given credit to the third person and thus enabled the fraud to be committed must be the sufferer. The case admits of two aspects. If the plaintiffs remained the owners of the goods, the Factors Acts apply. If they parted with the property in the goods when

(1) Law Rep. 3 Ex. 299.
(2) 3 App. Cas. 459.
(3) 1 H. & N. 503.
(4) 2 Taunt. 268.

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they gave them up to Denis Daly & Sons, clearly the defendants are entitled to the property. It is, moreover, contended that the contract is not one of pledge at all, and that it gave no special property in the goods to the plaintiffs. At any rate, by the very nature of the arrangement, when the goods were given up by the plaintiffs, the whole property was intended to be revested in the pledgors, the plaintiffs looking only to the proceeds of the sale. [He cited *Knights* v. *Wiffen* (1); *Vicars* v. *Hertz* (2); *White* v. *Garden* (3); *Attenborough* v. *St. Katharine's Dock Co.* (4); *Pease* v. *Gloahec.* (5)]

James, in reply.

Cur. adv. vult.

June 10. The judgment of the Court (Cockburn, C.J., and Mellor, J.), was delivered by

COCKBURN, C.J. This was an action for the wrongful conversion of a quantity of flour alleged to be the property of the plaintiffs.

The facts were shortly these: The plaintiffs, who are merchants at Liverpool, had lent to the firm of Denis Daly & Sons, also merchants at Liverpool, their acceptances for the sum of 11,500*l.* (for which Denis Daly & Sons undertook to provide at or before maturity), on the security of certain flour, a memorandum as to such security being given by Denis Daly & Sons in these terms: "As security for the due fulfilment on our part of this undertaking, we have warehoused in your name sundry lots of flour, and in consideration of your delivering to us, or our order, said flour as sold, we further undertake to specifically pay you proceeds of all sales thereof immediately on their receipt."

The flour was accordingly warehoused in the name of the plaintiffs in a room let to them for the purpose, and of which they kept the key and paid the rent.

Three of the acceptances thus given by the plaintiffs, amounting in the whole to 6500*l.* having been in due time provided for by Denis Daly & Sons, it was agreed between them and the

(1) Law Rep. 5 Q. B. 660.
(2) Law Rep. 2 H. L. (Sc.) 115.
(3) 10 C. B. 919.
(4) 3 C. P. D. 450, 464.
(5) Law Rep. 1 P. C. 219.

plaintiffs that the two remaining bills, for 2500*l.* each, should be renewed, which was accordingly done, a memorandum similar to the former one being again given by Denis Daly & Sons, whereby they undertook to provide for the acceptances at or before maturity, with this addition: "As security for the due fulfilment on our part of this undertaking, you hold two lots of Baltic whites flour, warehoused in December and January last." The Baltic whites flour thus mentioned consisted of 1500 sacks, being the flour originally pledged to the plaintiffs.

In the interval between the giving of these last-mentioned acceptances and the time of their becoming due, one of the firm of Denis Daly & Sons, on the 13th of May, 1878, applied to the defendants to advance them a sum of 2500*l.* on the security of the 1500 sacks of flour deposited, as has been stated, with the plaintiffs, but without in any way communicating to them the fact of the flour having been so deposited. The defendants, in entire ignorance of this fact, and believing the flour to be the property of Denis Daly & Sons, agreed to advance the 2500*l.* on the security of the flour, but on the terms that they were to have absolute possession of the flour, and to warehouse it in their own name, and to have power to sell it.

For the fraudulent purpose of obtaining possession of the flour, so as to be able to give possession of it to the defendants, Arthur Daly, one of the firm of Denis Daly & Sons, brought to the plaintiffs, but unknown to the defendants, a memorandum in these terms: "14th May, 1878. We have sold Messrs. R. & J. Lawson 1500 sacks of Baltic whites, payment as follows: 1000*l.* upon delivery, 1000*l.* in 14 days, 1000*l.* in a month, which amounts we will hand you as received. D. Daly & Sons."

The plaintiffs by the fraudulent misrepresentation that Denis Daly & Sons had found a purchaser for the flour, and would hand over to them the amount to be received as the price, were induced to part with the possession of the flour, and for that purpose gave, as requested, on the 14th of May, a delivery order to Denis Daly & Sons; and subsequently addressed a written direction to the landlord of the warehouse, which they delivered to Arthur Daly, to transfer the room in which the flour was deposited to Lawson & Co., which was accordingly done.

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The defendants on the same day that the delivery order was given by the plaintiffs to Denis Daly & Sons, namely, the 14th of May, advanced to Denis Daly & Sons the sum of 1725*l.*, and on the next day the further sum of 775*l.* in cash.

It is stated in the case that the fraudulent memorandum of the sale to the defendants, by which the plaintiffs were induced to give the delivery order for the flour, was brought to them by Arthur Daly after banking hours on the 14th, from which it may be inferred that the 1725*l.* advanced by the defendants to Denis Daly & Sons on that day, was advanced before the possession of the flour had been given up to the latter by the plaintiffs. Possession of the flour having been transferred to defendants, they, between the 18th of May and the 1st of June, by virtue of the right to sell vested in them by the agreement with Denis Daly & Sons, sold the flour in the Liverpool market for sums amounting in the whole to 2647*l.* 10*s.* 3*d.*, and the flour was delivered to the respective purchasers.

Of the 2500*l.* thus advanced by the defendants to Denis Daly & Sons, 500*l.* was paid by the latter to the plaintiffs, as part of the price received on the sale of the flour. But the plaintiffs have received no further payment, and Denis Daly & Sons have become bankrupts.

We have in this case to discharge the unpleasant duty of deciding on which of two innocent parties the loss, occasioned to one or other of them by the fraud of a third, shall fall. In discharging such a duty a Court, to use the words of Lord Cairns in *Cundy* v. *Lindsay* (1), "can do no more than apply rigorously the settled and well-known rules of the law." Unfortunately, however, some difficulty presents itself in the present case in applying the law. For the case is, so far as we are aware, sui generis, the contract out of which the claim of the plaintiffs arises being of an altogether exceptional character. The contract is not one in which goods are deposited upon the ordinary terms incidental to a bailment of pledge, namely, that the thing pledged shall remain in the possession of the pledgee until the engagement of the pledgor, which it was given to insure, has been fulfilled.

Here the pledgors, when they find a purchaser, are to have

(1) 3 App. Cas. 463.

possession of the thing pledged, in order to sell it, not in the name, or even on behalf of the pledgees, but as their own, subject only to the condition of handing over the proceeds in liquidation of the debt.

It may be doubted whether under such a contract any special property, however limited, vested in the pledgees, or whether their right was not limited to the possession and custody of the goods, so as to secure to them the knowledge of any sale which the owners might be able to make, and so to afford them the opportunity of insisting on the price being handed over to them as soon as paid.

Assuming, however, that under the contract with Denis Daly & Sons the plaintiffs acquired, as pledgees, a special property in the flour deposited in their name, it was subject to the right of the pledgors to have the flour given up to them on their finding a purchaser for the purpose of the sale by them as owners, without any intervention on the part of the pledgees. If, having obtained the goods for the purpose of selling them, and having sold them, the pledgors had kept the price instead of handing it over to the pledgees, the latter could not have disputed the title of the buyer, and would have had no remedy except by action against the pledgors for breach of contract.

In compliance with the agreement, the flour was delivered by the plaintiffs to Denis Daly & Sons, the pledgors, with the full intention that they should sell it as their own and make a good title to it to their vendees.

It is true that the possession of the goods was obtained by the fraud of the pledgors, but this appears to us to make no difference in the result. The flour having been given up by the plaintiffs to Denis Daly & Sons, conformably to the contract, to sell as their own, the special property vested in the plaintiffs as pledgees, whatever it may have been, was intentionally surrendered; and the possession having been parted with, the contract of pledge was, at all events for the time being, at an end. The abandonment of the property in, and the surrender of, the thing pledged might, as between the pledgees and pledgors, have been revoked as having been obtained by fraud, so long as the goods remained in the hands of the pledgors. But when, prior to any such

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revocation, the property in the goods had been transferred by the owners for good consideration to a bonâ fide transferee, the latter acquired, as it appears to us, an indefeasible title. The analogy to a case of sale where the vendor is induced to part with his property by fraud appears to us complete; and the principle laid down by the Court of Common Pleas in *White* v. *Garden* (1), and by the House of Lords in *Cundy* v. *Lindsay* (2), and acted upon by this Court in *Moyce* v. *Newington* (3), is, we think, applicable to the case before us; and we are therefore of opinion that the defendants acquired a good title to the flour by their contract with Denis Daly & Sons.

Our view of the case being founded on the assumption that the property in the goods became by the act of the pledgees revested in the pledgors, it makes no difference that the goods, having been parted with by the plaintiffs with a view to their being sold, were, instead of being sold, pledged. The property having by the act of the pledgees become revested in the pledgors, the latter were as competent to dispose of the goods by way of pledge as by that of sale.

Nor in this view of the case is it in any way material that the larger portion of the money advanced by the defendants to Denis Daly & Sons was paid (if we are to take the fact to have been so) before the possession of the flour was given up by the plaintiffs. The property in the flour was made over to the defendants, and the possession of it given up to them, by Denis Daly & Sons for good consideration when the full property in it was, as we think, in the latter, and the transfer took place by virtue of a contract whereby the money was to be advanced on the pledge of the goods. That the money was paid down before the goods were delivered, provided the property in the goods was in Denis Daly & Sons when, in fulfilment of the contract, they transferred the property in, and gave possession of, the flour, can make no difference.

But there is a further ground on which we are of opinion that the defendants are entitled to our judgment. We are prepared to hold, as we intimated in *Moyce* v. *Newington* (4), that where one

(1) 10 C. B. 919.
(2) 3 App. Cas. 459.
(3) 4 Q. B. D. 32.
(4) 4 Q. B. D. 35.

of two innocent parties must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud. It has been so held by the Supreme Court of Judicature of the State of New York in a case of *Root* v. *French*. (1) In *Vickers* v. *Hertz* (2) Lord Chancellor Hatherley says: "If one person arms another with a symbol of property he should be the sufferer, and not the person who gives credit to the operation and is misled by it." It is on this principle that the legislation with reference to fraudulent sales made by factors or agents intrusted with the possession of goods or of the documents of title to goods has been based. It was on this ground that the Court of Session in *Pochin* v. *Robinows* (3) and in *Vickers* v. *Hertz* (2), independently of the Factors Acts, and proceeding on general principles, decided in favour of an innocent purchaser. And though in *Vickers* v. *Hertz* (2) in the House of Lords the case was decided in favour of the defendant, as coming under the Factors Acts, Lord Colonsay expressly says that the judgment appealed from was well founded independently of those Acts.

Now in the case before us Denis Daly & Sons were allowed by the plaintiffs to appear as the ostensible owners of the flour, and to exercise uncontrolled dominion over it, without the plaintiffs, by intervening themselves in the transaction, as they might have done, securing themselves against any fraudulent conduct on the part of Denis Daly & Sons. It would, therefore, be in the highest degree unjust and inequitable that the defendants, Lawson & Co., who have innocently advanced money on the goods in the ordinary course of commercial dealing, should be sufferers through the improvident contract of the plaintiffs with Denis Daly & Sons, or want of proper caution on their part.

We, therefore, on both grounds, give judgment for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Gregory, Rowcliffe, & Co., for Stone & Fletcher.*

Solicitors for defendants: *Field & Roscoe, for Bateson.*

(1) 13 Wendell, 570. (2) Law Rep. 2 H. L., Sc. 115.
(3) 3rd Series, vol. vii. p. 622.

1879

June 10.

KING *v.* DAVENPORT.

Practice—Dismissal of Action for want of Prosecution—Order XXIX., r. 1—*Summons to extend Time for delivery of Statement of Claim—Adjournment by Consent.*

4 CPD 119
23
6 QBD 117

An order having been made on the 6th of May dismissing the action for want of prosecution if the statement of claim were not delivered within fourteen days, on the 19th of May the plaintiff took out a summons returnable the next day, the last of the fourteen days, for further time to deliver statement of claim. The summons was, on the 20th, adjourned, by the consent of the parties in writing indorsed thereon, till the 21st, and on the 21st a master made an order giving seven days more for delivery of statement of claim. Pollock, B., having rescinded the order of the master on the ground that he had no jurisdiction, the action being at an end on the 20th of May:—

Held, that the decision of the learned judge was correct.

Appeal from the order of Pollock, B., at chambers, rescinding an order of Master Francis.

The writ was issued on the 12th of March, 1879, and an appearance was entered on the 20th of March. The six weeks for delivery of statement of claim expired on the 1st of May. On the 5th of May the defendant took out a summons to dismiss the action for want of prosecution. On the 6th of May an order was made giving the plaintiff fourteen days within which to deliver his statement of claim. The fourteen days expired on the 20th of May, but on the 19th the plaintiff took out a summons for further time, the summons being returnable on the 20th. This summons was by some accident not served till the 20th, and on that day it was adjourned by consent in writing, indorsed upon the summons, till the next day. Upon the hearing of the summons on the 21st, Master Francis made an order giving seven days more for delivery of statement of claim. This order Pollock, B. rescinded on appeal, on the ground that the master had no jurisdiction, the action being at an end upon the authority of *Whistler* v. *Hancock*. (1)

Winch, for the plaintiff, moved, by way of appeal against the order of Pollock, B. *Whistler* v. *Hancock* (1) is an authority in favour of the plaintiff rather than against him, for Manisty, J.

(1) 3 Q. B. D. 83.

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there seems to have been of opinion that, if a summons had been taken out to vary the order fixing a period for the dismissal of the action, the action would have continued alive till the summons was disposed of. In *Ambroise* v. *Evelyn* (1), the Master of the Rolls held that where an enlargement of time is necessary, the parties may consent without getting an order from the Court.

Dickens, for the defendant, shewed cause. The action was dead at the end of the day on the 20th of May in the absence of any order prolonging the time for the delivery of the statement of claim. The mere consent of the parties to the adjournment of the summons was not sufficient to keep the action alive without an order from the Court.

Cur. adv. vult.

June 11. THE COURT (Cockburn, C.J., and Mellor, J.), refused the application, being of opinion that the action was at an end on the 20th of May, and therefore the master had no jurisdiction to make the order giving further time.

Order refused. (2)

Solicitors for plaintiff: *Brooke & Chapman.*
Solicitor for defendant: *Diggles.*

HARGREAVES *v.* SIMPSON.

June 19.

Municipal Election — Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 *Vict. c.* 60), *s.* 3—*Corrupt Practices Prevention Act*, 1854 (17 & 18 *Vict. c.* 102), *s.* 23—*Refreshments to Voters at Municipal Election.*

By the Corrupt Practices (Municipal Elections) Act, 1872, the provisions of s. 23 of 17 & 18 Vict. c. 102, by which giving refreshments to voters at parliamentary elections is made illegal under a penalty of forty shillings, are rendered applicable in the case of municipal elections.

A RULE nisi had been obtained calling on the county court judge of Cumberland and the defendant to shew cause why the county court judge should not proceed to hear and determine

(1) Weekly Notes, May 24, 1879, p. 99, 11 Ch. D. 779

(2) See *Burke* v. *Rooney*, 4 C. P. D. 226.

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eight plaints brought by the plaintiff against the defendant in the county court. It appeared that in each of the plaints the plaintiff sued for a penalty of forty shillings, for illegal treating at a municipal election. The proceedings were taken under the Corrupt Practices Prevention Act, 1854 (17 & 18 Vict. c. 102), s. 23, as being now applicable to municipal elections, by virtue of 35 & 36 Vict. c. 60, s. 3. The county court judge thought that he had no jurisdiction, and refused to hear the plaint.

Day, Q.C., and *Tennant*, shewed cause. It is submitted that the provisions of the 23rd section of the Corrupt Practices Prevention Act, 1854, are not made applicable to municipal elections. By that Act, ss. 3, 4, and 5, bribery, treating, and undue influence are the principal offences aimed at, and "treating" is defined. By the definition it is an offence that can only be committed by the candidate, it must be done corruptly, and it entails a penalty of 50*l*. The offence contemplated under s. 23 is quite different. It is not "treating." The scope of the provision was to prevent all refreshment being given to voters on the day of nomination or polling by any person, quite independently of proof of any corrupt motive, and the penalty is only forty shillings. By the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60), s. 3, the offences of bribery, treating, undue influence, and personation are to be deemed to be corrupt practices at an election, for the purposes of the Act. The terms "bribery," "treating," "undue influence," and "personation," are respectively to include anything committed or done before, at, after, or with respect to an election, which, if done before, at, after, or with respect to an election of members to serve in Parliament, would render the person committing the same liable to any penalties, &c., for bribery, treating, undue influence, or personation, as the case may be under any Act for the time being in force, with respect to elections of members to serve in Parliament. The "treating" here referred to is the graver offence provided for by the 4th section of 17 & 18 Vict. c. 102. It is submitted that the effect of this is only to apply the provisions relating to treating as defined in the 4th section of the Corrupt Practices Prevention Act, 1854, to municipal elections, and not those of s. 23.

W. A. Hunter supported the rule. The intention was to assimilate the law with regard to municipal elections to that relating to parliamentary elections. The object of s. 23 is to deal with the giving of refreshment to voters as a corrupt practice, with whatever motive it was given, and the whole scope and object of the later Act is to put down corrupt practices at municipal elections by the same machinery as was applicable in the case of parliamentary elections.

COCKBURN, C.J. We are of opinion that this rule should be made absolute. It seems to us that, having regard to the general scope of the Corrupt Practices (Municipal Elections) Act, 1872, it was intended to incorporate the provisions of the 23rd section of the Act of 1854, relating to parliamentary elections. The Act is for the prevention of corrupt practices at municipal elections. It is true that the offence created by s. 23 is not in terms called a "corrupt practice" or "treating," but the whole scope of the section seems to us to be to deal with it as a form of treating—as a milder and less noxious form of treating—but still as an offence coming under the same head. The general scope of the Act for preventing corrupt practices at municipal elections is to apply all the enactments relating to parliamentary elections to municipal elections. The mischief aimed at by the 23rd section applies as much to municipal as to parliamentary elections.

LUSH, J. I am of the same opinion. I think it is clear that the legislature intended by the Act of 1872 to put municipal elections on the same footing as parliamentary elections. The only question is, whether they have used words sufficiently wide for the purpose of incorporating the 23rd section. I think that they have.

MANISTY, J., concurred.

Rule absolute.

Solicitor for plaintiff: *J. R. Tindale.*
Solicitors for defendant: *Sharpe & Ullithorne.*

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June 20.

PHILLIPS *v.* THE SOUTH WESTERN RAILWAY COMPANY.

Damages, Insufficiency of—Negligence—New Trial.

The Court will grant a new trial, in an action for personal injuries sustained through the defendants' negligence, on the ground of the inadequacy of the damages found by the jury, when it appears upon the facts proved that the jury must have omitted to take into consideration some of the elements of damage properly involved in the plaintiffs' claim.

MOTION for a new trial, in an action for personal injuries, on the ground of insufficiency of damages and misdirection.

The facts sufficiently appear from the judgment.

April 25. *Ballantine, Serj.*, and *Dugdale,* shewed cause.

They contended that when the action was for unliquidated damages the Court would not grant a new trial on account of the damages being too small, unless there had been some mistake in point of law on the part of the judge or in the calculation of the figures by the jury, or some misconduct on the part of the jury. They cited *Rendall* v. *Hayward* (1); *Forsdike* v. *Stone* (2); *Falvey* v. *Stanford* (3); *Rowley* v. *London and North Western Ry. Co.* (4); *Barker* v. *Dixie* (5); *Mauricet* v. *Brecknock* (6); *Armytage* v. *Haley* (7); *Kelly* v. *Sherlock.* (8)

Sir J. Holker, A.G., Pope, Q.C., and *A. L. Smith,* supported the rule. They cited *Pym* v. *Great Northern Railway.* (9) (10)

Cur. adv. vult.

June 20. The judgment of the Court (Cockburn, C.J., and Lopes, J.), was delivered by

COCKBURN, C.J. This was an action brought by the plaintiff

(1) 5 Bing. N. C. 424.
(2) Law Rep. 3 C. P. 607.
(3) Law Rep. 10 Q. B. 54.
(4) Law Rep. 8 Ex. 221.
(5) 2 Str. 1051.
(6) 2 Doug. 509.
(7) 4 Q. B. 917.
(8) Law Rep. 1 Q. B. 686.
(9) 2 B. & S. 759; 31 L. J. (Q.B.) 249.

(10) The arguments and the authorities cited on the question whether there had been a misdirection are not given, inasmuch as it turned principally on the construction of the expressions used by the learned judge at the trial (Field, J.), and the Court, as will be seen, did not think that there had been any misdirection on a fair construction of the summing up.

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to recover damages for injuries suffered, when travelling on the defendants' railway, through the negligence of their servants. A verdict having passed for the plaintiff with 7000*l.* damages, an application is made to this Court for a new trial, on behalf of the plaintiff, on the ground of the insufficiency of the damages as well as on that of misdirection as having led to an insufficient assessment of damages; and we are of opinion that the rule for a new trial must be made absolute; not indeed on the ground of misdirection, for we are unable to find any misdirection, the learned judge having in effect left the question of damages to the jury, with a due caution as to the limit of compensation, though we think it might have been more explicit as to the elements of damage.

It is extremely difficult to lay down any precise rule as to the measure of damages in cases of personal injury like the present. No doubt, as a general rule, where injury is caused to one person by the wrongful or negligent act of another, the compensation should be commensurate to the injury sustained. But there are personal injuries for which no amount of pecuniary damages would afford adequate compensation, while, on the other hand, the attempt to award full compensation in damages might be attended with ruinous consequences to defendants who cannot always, even by the utmost care, protect themselves against carelessness of persons in their employ. Generally speaking, we agree with the rule as laid down by Brett, J., in *Rowley* v. *London and North Western Ry. Co.* (1), an action brought on the 9 & 10 Vict. c. 93, that a jury in these cases "must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider under all the circumstances a fair compensation." And this is in effect what was said by Mr. Justice Field to the jury in the present case. But we think that a jury cannot be said to take a reasonable view of the case unless they consider and take into account all the heads of damage in respect of which a plaintiff complaining of a personal injury is entitled to compensation. These are the bodily injury sustained; the pain undergone; the effect on the health of the sufferer, according to its degree and its

(1) Law Rep. 8 Ex. 231.

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probable duration as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure, or to lessen the amount of injury; the pecuniary loss sustained through inability to attend to a profession or business as to which, again, the injury may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life. If a jury have taken all these elements of damage into consideration, and have awarded what they deemed to be fair and reasonable compensation under all the circumstances of the case, a Court ought not, unless under very exceptional circumstances, to disturb their verdict. But looking to the figures in the present case, it seems to us that the jury must have omitted to take into account some of the heads of damage which were properly involved in the plaintiff's claim.

The plaintiff was a man of middle age and of robust health. His health has been irreparably injured to such a degree as to render life a burden and source of the utmost misery. He has undergone a great amount of pain and suffering. The probability is that he will never recover. His condition is at once helpless and hopeless. The expenses incurred by reason of the accident have already amounted to 1000*l*. Medical attendance still is and is likely to be for a long time necessary. He was making an income of 5000*l*. a year, the amount of which has been positively lost for sixteen months between the accident and the trial, through his total incapacity to attend to his professional business. The positive pecuniary loss thus sustained all but swallows up the greater portion of the damages awarded by the jury. It leaves little or nothing for health permanently destroyed and income permanently lost. We are therefore led to the conclusion, not only that the damages are inadequate but, that the jury must have omitted to take into consideration some of the elements of damage which ought to have been taken into account.

It was contended, on behalf of the defendants, that even assuming the damages to be inadequate, the Court ought not on that account to set aside the verdict and direct a new trial, inadequacy of damages not being a sufficient ground for granting a new trial in an action of tort, unless there has been misdirection, or misconduct in the jury, or miscalculation, in support of which

position the cases of *Rendall* v. *Hayward* (1), and *Forsdike* v. *Stone* (2) were relied on. But in both those cases the action was for slander, in which, as was observed by the judges in the latter case, the jury may consider, not only what the plaintiff ought to receive, but what the defendant ought to pay. We think the rule contended for has no application in a case of personal injury, and that it is perfectly competent to us if we think the damages unreasonably small to order a new trial at the instance of the plaintiff. There can be no doubt of the power of the Court to grant a new trial where in such an action the damages are excessive. There can be no reason why the same principle should not apply where they are insufficient to meet the justice of the case.

The rule must therefore be made absolute for a new trial.

Rule absolute.

Solicitors for plaintiff: *Hargrove & Co.*
Solicitor for defendants: *Hall.*

THE OVERSEERS OF THE TOWNSHIP OF MANCHESTER, APPELLANTS; THE GUARDIANS OF ST. PANCRAS, RESPONDENTS.

July 2.

*Poor Law—Illegitimate Child under Sixteen—Derivative Settlement—*39 & 40 *Vict. c.* 61, *s.* 35.

Under the Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 35, an illegitimate child under sixteen does not take the settlement of its mother where such settlement has been derived from her marriage.

CASE stated under 12 & 13 Vict. c. 45, s. 11.

1. Thomas Skeats, the pauper, was born in the township of Manchester, out of wedlock, on or about the 2nd of June, 1869.

2. The parent of Thomas Skeats was Louisa Skeats, the divorced wife of William Skeats, such divorce having been decreed in 1865, about three years before Thomas Skeats was born. Her maiden name was Best.

(1) 5 Bing. N. C. 424. (2) Law Rep. 3 C. P. 607.

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3. Louisa Skeats died on the 24th of September, 1875.

4. William Skeats was married to Louisa Best on the 18th of February, 1851.

5. From 1857 until the time of his being divorced from the pauper's parent, William Skeats rented a house known as 133, Queen's Road, in the parish of Brighton, and paid rates and taxes in respect of the same, and thereby gained a settlement in that parish. Louisa Skeats derived such settlement from her husband, and since her divorce she has acquired no settlement for herself.

6. On the 12th of November, 1878, the pauper, Thomas Skeats, by order of justices of that date, was adjudged to be settled in the appellant township of Manchester, in consequence of his having been born there, as before mentioned.

7. The appellants contend that, as Louisa Skeats at the time when she was divorced from her husband was settled in the parish of Brighton, in which her husband had gained a settlement, the pauper, Thomas Skeats, was entitled to such settlement.

8. The respondents contend that the pauper, Thomas Skeats, is, by reason of s. 35 of 39 & 40 Vict. c. 61, legally settled in the appellant township of Manchester, where he was born, because the settlement of his parent, Louisa Skeats, cannot be shewn without inquiring into the settlement such parent derived from her husband.

9. The question for the opinion of the Court is whether the order was rightly made upon the township of Manchester, where the pauper was born.

Tickell, for the appellants. By the law previous to the Act an illegitimate child under sixteen took the settlement of its mother, whether derivative or not, but on attaining sixteen was removable to the parish of its birth: 4 & 5 Wm. 4, c. 76, s. 71; *St. Andrew, Worcester* v. *Bodenham.* (1) The object of 39 & 40 Vict. c. 61, s. 35 (2), was to allow an illegitimate child to retain its mother's

(1) 1 E. & B. 65; 22 L. J. (M.C.) 39.

(2) 39 & 40 Vict. c. 61, s. 35: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father, or of its widowed mother, as the case

settlement after the age of sixteen, and not to introduce a new hardship by making such a child removable where its mother's settlement is derived from her husband.

[LUSH, J. The hardship is the same in the case of a legitimate child.]

The latter part of the section speaks of the settlement which a child "derives" from its parent. This does not apply to the settlement of an illegitimate child, which by virtue of the word "retain" in the earlier part of the section is an original, and not a derivative, settlement.

J. F. Clerk, for the respondents, was not heard.

LUSH, J. I am unable to give any meaning to the words of s. 35, except that which the justices put upon them. What may have been the motive of the legislature I do not know, but they have expressly said, "If any child in this section mentioned" (that is, any legitimate or illegitimate child) "shall not have acquired a settlement for itself, and it cannot be shewn what settlement such child derived from the parent without inquiring into the derivative settlement of such parent, such child shall be settled in the parish in which it was born." There is nothing to confine the expression "any child" to any particular class of children.

MANISTY, J. I am of the same opinion. I think the words of the latter part of the section are too strong to be got over.

Judgment for the respondents.

Solicitors for appellants: *Johnson & Weatherall.*
Solicitor for respondents: *Rexworthy.*

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may be, up to that age, and shall retain the settlement so taken until it shall have acquired another.

"An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

"If any child in this section mentioned shall not have acquired a settlement for itself, or, being a female, shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

1878
Dec. 10.

[IN THE COURT OF APPEAL.]

IN THE MATTER OF AN ARBITRATION BETWEEN BIDDER AND OTHERS AND THE NORTH STAFFORDSHIRE RAILWAY COMPANY.

Practice—Appeal—Jurisdiction of Court of Appeal—Special Case stated by Umpire under the Lands Clauses Consolidation Act, 1845—*Order of High Court—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *ss.* 5, 32—*Supreme Court of Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 19—*Mine—Grant of Right of Way unconnected with Working of Mines—Grant of "Waggon or Cart Road," whether it confers Right to lay down Railroad or Tramway—Mining Lease—Power to lay Railway to carry away Coals, the Produce of the Mines demised or any other Mines.*

The Court of Appeal has jurisdiction to entertain an appeal from the decision of the High Court of Justice upon a special case stated by an umpire appointed under the Lands Clauses Consolidation Act, 1845, to assess the compensation for lands taken for the purposes of an undertaking, or injured by the execution of the works thereof.

Rhodes v. *Airedale Drainage Commissioners* (1 C. P. D. 402) commented upon and followed.

H., being the owner of certain land and the mines thereunder, by indenture conveyed the surface to C.; but he excepted and reserved a "waggon or cart road" of the width of eighteen feet, to be at all times thereafter kept in repair at his own costs and charges:—

Held, that these words would not enable H. to lay down a railroad or tramway for the carriage of coals raised from neighbouring collieries belonging to him.

Senhouse v. *Christian* (1 T. R. 560), *Durham and Sunderland Ry. Co.* v. *Walker* (2 Q. B. 940), *Dand* v. *Kingscote* (6 M. & W. 174), distinguished.

By a lease of mines the lessees were authorized to take and use "full and sufficient rail and other ways, paths, and passages to and for the said lessees and their agents, servants, and workmen, or others," to carry away "all or any of the coal, cannel, slack, iron, and ironstone, the produce of the mines thereby demised, or any other mines":—

Held, that the lessees, by virtue of this clause, might lay down a railway for the carriage of coals raised by them from the pits of adjoining collieries worked by them, and that they were not restricted to using the railway for the carriage of coals raised by or through the pits of the mines demised to them by the above-mentioned lease.

APPEAL from an order made by the Queen's Bench Division upon the award of an umpire under the Lands Clauses Consolidation Act, 1845, which had been stated in the form of a special case.

The award recited that by virtue of the North Staffordshire Railway (Potteries Loop Line) Act, 1865, and of other Acts of

Parliament incorporated therewith, the North Staffordshire Railway Company had taken for the purposes of a certain railway about to be constructed by them, certain lands situate at or near to Kidsgrove, in the county of Stafford; that G. P. Bidder, Sir G. Elliot, S. P. Bidder, and G. P. Bidder, junior (thereinafter called the claimants) had given notice to the company that they held the mines and minerals thereunder, with certain powers and privileges relating to the surface thereof, under a lease for the term of thirty-two years from the 1st of January, 1870, from J. H. E. Heathcote; and, further, that they claimed the sum of 20,000*l.* for the purchase of their interest in the lands taken possession of for the purposes of the railway, and for compensation for injury sustained and to be sustained by the execution of the works; and also that they desired that the amount to be paid to them should be settled by arbitration in the manner prescribed by the Lands Clauses Consolidation Act, 1845; that the claimants and the company, not having concurred in the appointment of a single arbitrator, severally appointed arbitrators, who nominated an umpire; that the arbitrators having disagreed respecting the matters referred to them, the umpire took upon himself the burden of the reference, and made his "award in writing of and concerning the premises in the form of a special case for the opinion of the Queen's Bench Division of the High Court of Justice." The following were the material portions of the award.

Prior to the 24th of June, 1851, J. E. Heathcote was the owner of certain land and certain mines situate at Kidsgrove, and by indenture of that date he conveyed to W. Cooper the surface of a part of his land; by the same indenture J. E. Heathcote excepted and reserved unto himself, his appointees, heirs, and assigns, the mines, and also a right of way or road along the south-west side of a specified piece of land as and for a waggon or cart road, which way or road was to be of the clear width of eighteen feet, and to be at all times thereafter maintained and kept in repair by and at the costs and charges of J. E. Heathcote, his appointees, heirs, and assigns. This right of way is hereinafter called "right of road." Power to work the mines was reserved, "but not by entry upon, or any working from the surface."

By indenture of lease of the 31st of March, 1859, made between

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C. B. Lawton, of the one part, and E. Andrew, S. P. Bidder, and G. Elliott, of the other part, C. B. Lawton demised to the parties of the other part certain mines and minerals situate near Kidsgrove, together with full liberty, license, power, and authority for the lessees and their servants, agents, and workmen, from time to time during the continuance of the term thereby granted, to enter into and upon, and use and occupy, such parts of the surface of the said lands and premises, any mines under which were thereby appointed and demised, as should be reasonably requisite for the working and getting the said mines and minerals thereby appointed and demised, and any part thereof, or for carrying into effect any of the purposes thereby authorized in the most efficient and proper manner; with the like liberty, license, power, and authority (but subject to the conditions, restrictions, and provisions thereinafter expressed in that behalf), to search for, use, take, and dispose of the said coals, cannel, slack, iron, and ironstone thereby appointed and demised, or any part or parts thereof, and to use the then existing, and dig, sink, drive, work, and make new and other pits, shafts, groves, drifts, trenches, sluices, ways, gates, water-gates, and water-courses, and to use and repair the then existing, and make or erect upon the same lands any furnace or furnaces, mills, engines, coke-ovens, or other erections, or works whatsoever, as well for the finding, discovering, winning, working, cleansing, manufacturing, and procuring the coal, cannel, slack, iron, and ironstone, as well out of the said mines thereby demised, as any other mines or minerals, as for the avoiding and carrying away water, foul air, and stench from and out of the same. Provided always, and it was thereby expressly agreed, that it should be lawful to the said lessees to work the said mines thereby demised through pits or shafts made and sunk in, upon, and within other premises in the occupation for the time being of the said lessees, and with the like liberty, license, and authority, and power to take and use sufficient ground-room, heap-room, and pit-room not exceeding twenty acres in extent, for laying and plotting the coal, cannel, slack, or ironstone, and iron, and other materials and substances, which should from time to time proceed from and be wrought and dug as well out of the said mines and premises thereby appointed and demised as of any other mines, the part or

parts of the surface of the said lands to be taken and used for the purposes aforesaid, to be determined by the said C. B. Lawton, or the person or persons for the time being entitled as thereinafter mentioned, or if the lessees should object to the part or parts so determined upon, then to be ascertained and determined by arbitration pursuant to the proviso for that purpose thereinafter contained, and full and sufficient rail and other ways, paths, and passages to and for the said lessees and their agents, servants, and workmen, or others, from time to time during the continuance of the term thereby granted to take and carry away with horses, carts, wains, waggons, locomotive and other engines and carriages, all or any of the coal, cannel, slack, iron, and ironstone, the produce of the said mines thereby demised, or any other mines, and any coke into which any such coal or slack should be converted, and which ways, paths, and passages might be used and made in, upon, through, and over not only the lands under which the said mines lay, but also any lands comprised in and then subject to the limitations of an indenture of the 17th of March, 1829; and also with the like license, power, and authority to use the then existing, and erect, build, and set up in any convenient place or places near to any of the said mines thereby appointed and demised all such new or other houses, hovels, lodges, sheds, and other buildings as should be needful and convenient for the standing, laying, preserving, or placing of any workmen's houses, gear, tackle, implements, and utensils to be employed or used in or about the working of the said mines thereby demised, and any other mine or mines; and to do whatever else might be requisite, necessary, or convenient in, about, or for the winning, working, obtaining, getting, washing, scouring, cleansing, and melting, and manufacturing of the said thereby appointed and demised mines, and other coal, cannel, slack, iron, and ironstone, and for the manufacturing, taking, and carrying away the same; to hold the same from the 25th of March, 1859, for thirty-nine years thence next ensuing.

By an indenture of lease, dated the 10th day of June, 1870, and made between J. H. E. Heathcote, in whom the estate and title of the said J. E. Heathcote of and in the mines before mentioned were then vested, of the one part, and G. P. Bidder,

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S. P. Bidder, and G. Elliott of the other part, the said J. H. E. Heathcote, thereinafter called the lessor, demised to the parties of the second part, thereinafter called the lessees, the Woodshutt Colliery and the said mines, together with certain powers over the surface, together with full liberty, power, and authority for the lessees to use any of the existing railway or railways, tramway or tramways, roads or ways, and to lay out, make, and use any new railway or tramway, railways or tramways, in any course or direction over a portion of the said surface, for the purpose of conveying and removing the coal, cannel, slack, stone, sand, and also to divert or alter any roadway, railway, or tramway for the time being existing over the said lands (other than and except any public road), and to remove the materials thereof; to hold the same for thirty-two years from the 1st of January, 1870.

The mines demised by the indenture of the 31st of March, 1859, and those demised by the indenture of the 10th of June, 1870, were immediately adjacent. The rights of the lessees under the above-mentioned leases became vested in the claimants. Under the powers of their Act, the company had taken a portion of the surface over the mines demised by the indenture of the 10th of June, 1870, and had thereby cut off all access from these mines to the Trent and Mersey Canal, except by going over the surface of the mines demised by the indenture of the 31st of March, 1859, as hereinafter mentioned. The company had taken also the whole of the land over which the "right of road" passed, which was reserved by the indenture of the 24th of June, 1851. Since the conveyance to Cooper of the 24th of June, 1851, some houses had been erected, whose back yards abutted on the piece of land over which the "right of road" passed, and the tenants of these houses had used this piece of land as a means of access to their back yards. This piece of land and the houses belonged to the same owner in fee. There formerly existed two pit-shafts, which were used some years previously for working the coal out of part of the mines demised by the indenture of the 10th of June, 1870. One of these pits had been taken by the railway company, and the other was severed by the railway from the rest of the surface of the land demised by the last-named indenture, and was thereby rendered valueless to the claimants. In February, 1871, the

railway company gave Mr. Heathcote notice to treat for the land, which they had since taken as aforesaid. The claimants had not at that time begun to work the Woodshutts Colliery, and in consequence of the giving of such notice they had abstained from working it. Before the railway was made, the claimants had access from their pits to the Trent and Mersey Canal by passing along the "right of road" and afterwards crossing a public highway called Heathcote Street. Access to the canal was of considerable value to colliery owners in that neighbourhood, as by means of the canal they were enabled to sell and deliver their slack to the proprietors of saltworks in Cheshire. Carriage by canal was cheaper than carriage by railway, and in addition there was access by canal to many saltworks, to which there was no or a less convenient access by railway. In the case of the claimants, the value of their access to the canal depended to a great extent on whether they could have laid a locomotive railway or a tramway with an endless chain from the old engine pits to the bank of the canal. The claimants could have laid a locomotive railway along the "right of road" without substantially interfering with the level of the surface, but to do so they must have laid a double line of rails along the whole length of the "right of road," and they must have erected fixed buffer-stops at the end of one of those lines next to Heathcote Street, so as to form a blind siding to receive full waggons and prevent their running away over Heathcote Street. They would have crossed Heathcote Street by a single line, and necessarily on the level. The double line of rails would, with waggons standing on each line, have taken up the whole width of eighteen feet of the "right of road," and it would have been very dangerous for the inhabitants of the houses, the back yards of which abutted on it, to use that road, as in fact they had been accustomed to do. In the colliery districts it was not at all unusual to lay locomotive railways across public roads on the level. The inhabitants of towns in those districts, such as Kidsgrove, were mainly dependent on the development of the coalfield in their vicinity, and the local board surveyors or trustees having the care of the road were usually asked to give, and gave, permission to colliery proprietors to lay lines across the public road on the level, and to cross it

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with waggons and locomotive engines. These level crossings almost invariably made, and the one across Heathcote Street would have made, the road substantially less convenient to the public; but if the railway company had not taken the land in question, and if the Woodshutts Colliery had been in the market, an intending purchaser, if he would have had a right to use the "right of road" in the way suggested above, would have assumed that he would be allowed to cross Heathcote Street on the level according to the usual practice, and would have given a higher price for the colliery than if he had had no such access by locomotive railway to the canal. The claimants could have made an endless chain tramway along the "right of road" and down to the bank of the canal, but to do so they must have substantially interfered with the level of the surface, as it would have been impossible to take an endless chain tramway across Heathcote Street on the level, and consequently the endless chain tramway must either have gone over or under Heathcote Street. An endless chain tramway would have required no fixed buffer-stops, would have taken up only ten feet in width of the "right of road," and if constructed as it might have been on the side furthest from the houses, would not substantially have interfered with the use, which the tenants of those houses had hitherto made of that road. The company contended that, under the indenture of the 24th of June, 1851, the claimants were not entitled to use the "right of road" thereby reserved in either of the ways suggested above, and consequently that the compensation, to which they were entitled, must be assessed on the basis of their having no such right. The company further contended that, assuming the claimants were entitled to use the "right of road" in the manner suggested above with reference to a locomotive railway, inasmuch as such use necessarily involved the crossing of Heathcote Street on the level, and as such level crossing was precarious and not as of right, the umpire ought not to take the possibility of its being done into consideration in assessing the compensation.

As the railway company had taken all that part of the surface of the Woodshutts Colliery which abutted on the canal, all direct communication between the old pits and the canal was necessarily cut off; but the company contended that the claimants had an

indirect mode of communication by going over the lands, the mines under which were demised by Lawton in the indenture of the 31st of March, 1859. The company suggested that the claimants should sink fresh pits at a certain point, raise the coal and slack to the surface there out of the Woodshutts Colliery, and convey it by means of an endless chain tramway to a point where it could be loaded into railway waggons and taken by a locomotive to an existing line belonging to the claimants, and so either to the canal or on to the North Staffordshire Railway. This scheme was perfectly practicable, if under their lease the claimants had the power of carrying the coal and slack so raised from the Woodshutts Colliery over the surface of the Lawton estate; and if this scheme were adopted, the loss which the claimants would sustain by the taking away of direct access to the canal, and consequently the compensation to which they were entitled would be much diminished. The claimants contended that under the terms of the Lawton lease they were not entitled to carry coal and slack over the Lawton estate in the manner suggested.

The questions for the Court were, first, whether in assessing the compensation to which the claimants were entitled, the umpire was at liberty to take into consideration the increased value of the colliery, which would have arisen from the construction and use of a locomotive railway or tramway over the "right of road;" secondly, whether in assessing such compensation, the umpire was at liberty to take into consideration the diminution of loss, which would arise from the construction and use of a tramway and railway over the Lawton estate.

If the Court should answer the first question in the affirmative and the second in the negative, the umpire awarded and adjudged that the claimants had sustained damage in respect of their interest in the lands, which had been taken for or injuriously affected by the execution of the company's works, to the amount of 7060*l.* and were entitled to be paid compensation for the same to that amount.

If the Court should answer both questions in the affirmative, the umpire awarded and adjudged that the claimants had sustained damage as aforesaid to the amount of 5200*l.*, and were entitled to be paid compensation for the same to that amount.

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If the Court should answer both questions in the negative, the umpire awarded and adjudged that the claimants had sustained damage as aforesaid to the amount of 2480*l.*, and were entitled to be paid compensation for the same to that amount.

If the Court should answer the first question in the negative and the second in the affirmative, the umpire awarded and adjudged that the claimants had sustained damage as aforesaid to the amount of 1560*l.*, and were entitled to be paid compensation for the same to that amount.

The appointments of arbitrators by the claimants and the company respectively, and the appointment of the umpire, had been made an order of the Queen's Bench Division.

By an order of the Queen's Bench Division, "in answer to the questions submitted to the Court by" the umpire "herein by the special case, the Court finds the first question in the affirmative and the second question in the negative: it is ordered that judgment be entered for G. P. Bidder, Sir G. Elliott, S. P. Bidder, and G. P. Bidder, junior, on the special case herein for the sum of 7060*l.* with costs."

The North Staffordshire Railway Company appealed.

Nov. 26. *H. Sutton*, for the claimants. As a preliminary objection, it is contended on behalf of the claimants, that this Court has no jurisdiction to hear this case; for no appeal lies on a special case stated by arbitrators or an umpire appointed to assess compensation under the Lands Clauses Consolidation Act, 1845. (1)

(1) By the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), "With respect to the purchase and taking of lands otherwise than by agreement, be it enacted as follows:"

By s. 18: The promoters of the undertaking are to give notice of their intention to take lands.

By s. 22: If no agreement be come to between the promoters and the owners, and, if the compensation do not exceed 50*l.*, the same shall be settled by justices.

By s. 23: If the compensation claimed shall exceed 50*l.*, and if the party claiming compensation desire to have the same settled by arbitration, the same shall be so settled accordingly.

By s. 25: "When any question of disputed compensation by this or the special Act, or any Act incorporated therewith, authorized or required to be settled by arbitration shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator, to whom such dispute shall be referred; and every appointment of an arbitrator

The umpire had no power to state a case for the opinion of the Queen's Bench Division, and that Court might have declined to exercise jurisdiction, for the awarding of compensation is not a

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shall be . . . . delivered to the arbitrator, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made, neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as a revocation."

By s. 27: "Where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint by writing under their hands an umpire to decide on any such matters on which they shall differ, or which shall be referred to him under the provisions of this or the special Act."

Sects. 28 to 34 contain provisions as to the appointment of arbitrators and umpire and the conduct and costs of proceedings before them.

By s. 35: "The arbitrators shall deliver their award in writing to the promoters of the undertaking, and the said promoters shall retain the same, and shall forthwith on demand, at their own expense, furnish a copy thereof to the other party to the arbitration, and shall at all times, on demand, produce the said award, and allow the same to be inspected or examined by such party or any person appointed by him for that purpose."

By s. 36: "The submission to any such arbitration may be made a rule of any of the superior Courts on the application of either of the parties."

By s. 68: "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50*l*., such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided."

By the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 5: "It shall be lawful for the arbitrator upon any compulsory reference under this Act, or upon any reference by consent of parties where the submission is or may be made a rule or order of any of the superior Courts of law or equity at Westminster, if he shall think fit, and if it is not provided to the contrary, to state his award as to the whole or any part thereof, in the form of a special case for the opinion of the Court, and

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reference within the Common Law Procedure Act, 1854, s. 5, even although the submission to arbitration may be made a rule of Court under the Lands Clauses Consolidation Act, 1845, s. 36. However, neither party objected to the hearing in the Queen's Bench Division, and accordingly a decision upon two questions submitted to it, was pronounced in that Court; but that decision, was an order made by consent, and therefore if more than a mere expression of opinion, is not subject to appeal: Supreme Court of Judicature Act, 1873, s. 49. The claimants do not consent to an appeal to this Court from that decision of the Queen's Bench Division. The proper mode of enforcing payment of the amount awarded, is by action in which the company may insist on all legal objections. But, further, it is contended for the claimants, that the decision of the Queen's Bench Division was a mere expression of opinion, and that the direction as to the entry of the judgment for 7060*l.* with costs, was only surplusage; and therefore no appeal will lie to this Court: *Jones* v. *Victoria Graving Dock Co.* (1); *Reg.* v. *Overseers of Walsall* (2); *Courtauld* v. *Legh.* (3)

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when an action is referred judgment, if so ordered, may be entered according to the opinion of the Court."

By s. 32: "Error may be brought upon a judgment upon a special case, in the same manner as upon a judgment upon a special verdict, unless the parties agree to the contrary; and the proceedings for bringing a special case before the court of error shall, as nearly as may be, be the same as in the case of a special verdict; and the court of error shall either affirm the judgment, or give the same judgment as ought to have been given in the court in which it was originally decided, the said court of error being required to draw any inferences of fact from the facts stated in such special case which the court where it was originally decided ought to have drawn."

By the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 19: "The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of her Majesty's High Court of Justice, or of any judges or judge thereof, subject to the provisions of this Act, and to such rules and orders of court for regulating the terms and conditions on which such appeals shall be allowed, as may be made pursuant to this Act."

By s. 49: "No order made by the High Court of Justice or any judge thereof by the consent of parties, or as to costs only which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or judge making such order."

(1) Per Lord Coleridge, C.J., 2 Q. B. D. 314, at pp. 326, 327, 328.

(2) 3 Q. B. D. 457; reversed on appeal, 4 App. Cas. 30.

(3) Law Rep. 4 Ex. 187.

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J. Brown, Q.C., for the company. It is submitted that *Rhodes* v. *Airedale Drainage Commissioners* (1) shews conclusively that an umpire appointed to assess compensation under the Lands Clauses Consolidation Act, 1845, has power to state a case for the opinion of the Court.

[BRAMWELL, L.J. This preliminary objection is not decided by *Rhodes* v. *Airedale Drainage Commissioners*. (1) In that case the Court of Appeal held that an arbitrator appointed under the Lands Clauses Consolidation Act, 1845, had power under the Common Law Procedure Act, 1854, to state a case for the opinion of a superior Court of law; it is therefore conclusive that the umpire had power to state a special case for the opinion of the Queen's Bench Division; but the point now to be determined is whether we have jurisdiction to hear an appeal from the decision of the Queen's Bench Division upon that special case.]

In any point of view the decision was an "order" within the meaning of the Supreme Court of Judicature Act, 1873, s. 19, and therefore is subject to appeal.

[COTTON, L.J. It seems to me that the claimants are in a dilemma; the Queen's Bench Division either had or had not power to make the order complained of; if they had power, an appeal clearly lies; if they had not, the company are entitled to have the order set aside.]

Even before the Supreme Court of Judicature Acts, 1873, 1875, error lay upon a special case by the Common Law Procedure Act, 1854, s. 32, and the decision in *Courtauld* v. *Legh* (2) may be explained by the circumstance that the parties had agreed not to bring error. In *Jones* v. *Victoria Graving Dock Co.* (3) two of the judges in the Court of Appeal (Bramwell and Brett, L.JJ.) appeared to think that an appeal would lie upon a special case stated by an arbitrator, to whom an action had been referred, although Lord Coleridge, C.J., seemed to be of a different opinion; the Court, however, was unanimous that the parties had by agreement debarred themselves from appealing. In *Reg.* v. *Overseers of Walsall* (4) a case had been stated by a court of quarter sessions for its own

(1) 1 C. P. D. 402.
(2) Law Rep. 4 Ex. 187.
(3) 2 Q. B. D. 314.
(4) 3 Q. B. D. 457; reversed on appeal, 4 App. Cas. 30.

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information, and there is a wide difference between a proceeding of that kind and a reference to determine the conflicting rights of private persons.

[BRAMWELL, L.J. Whatever may be the ultimate decision of that case, I am satisfied that it has not the slightest bearing upon the question before us.]

It was intended by the legislature to allow the widest liberty of appealing from orders made by the High Court of Justice.

BRAMWELL, L.J. We all think that we ought to hear this case upon the merits. I have considerable doubt whether if the Supreme Court of Judicature Acts, 1873, 1875, had not passed, we could have heard this appeal; and my doubt arises from the technical reason to which I alluded in *Courtauld* v. *Legh* (1), namely, that error lay only on the judgment of a court of record; and with all submission to those learned judges who may have thought otherwise, I very much doubt whether under the Lands Clauses Consolidation Act, 1845, the Court has power to order the payment of money, even although the submission has been made a rule of Court; for the arbitrator himself does not order, or at least ought not to order, the payment of money; he only finds what is the proper amount of compensation, which does not become due until the claimant has done his part, that is to say, has executed a conveyance. (2) In the present case the umpire has awarded contingently upon the answers of the Court four different sums of money, and it is only when the Court has answered the questions submitted to them in a certain manner, that one of the specified amounts becomes payable by his direction; he does not order the amount to be paid, but simply finds that the claimants "are entitled to be paid compensation for the" damage sustained "to that amount." Therefore I incline to think that the Queen's Bench Division had not power to order the payment of any sum, and it seems to me doubtful whether, if I am right as to that, error would be maintainable under the Common Law Procedure Act, 1854, s. 32, upon a special case like this. However that may be, I am clearly of opinion that the decision of the Queen's Bench

(1) Law Rep. 4 Ex. 187, at p. 189.
(2) See *East London Union* v. *Metropolitan Ry. Co.*, Law Rep. 4 Ex. 309.

Division was an "order" within the Supreme Court of Judicature Act, 1873, s. 19. I am sure that the legislature intended that enactment to include such a decision as that now before us. I therefore think that an appeal will lie. Before concluding my remarks I wish to say that I agree with the observation made by Cotton, L.J., in the course of the argument, that the claimants are in a dilemma; either there was no jurisdiction in the Queen's Bench Division to give a decision, and then the company are entitled to have the proceedings set aside; or there was jurisdiction, and then the company are at liberty to shew that a different amount ought to have been awarded.

BRETT, L.J. It seems to me that in *Rhodes* v. *Airedale Drainage Commissioners* (1), this Court held that where the promoters and the claimant under the Lands Clauses Consolidation Act, 1845, have agreed to appoint arbitrators, they have agreed to that which is a submission to arbitration within the Common Law Procedure Act, 1854, s. 5, and that consequently the arbitrators or umpire have power to state a special case for the opinion of the High Court of Justice. Therefore the Queen's Bench Division had jurisdiction to hear and decide upon the special case now before us; and it seems to me to follow that their decision was an "order" within the Supreme Court of Judicature Act, 1873, s. 19, and that this Court is bound to hear an appeal from it.

COTTON, L.J. I am of opinion that we are bound to entertain this appeal by virtue of the Supreme Court of Judicature Act, 1873, s. 19. It might have been different if, as has been contended, this special case had been stated for the opinion of the Queen's Bench Division merely by the consent of parties, without any power in the umpire so to do independently of that consent; for it might have been argued that the parties had by their consent given that Court a jurisdiction which it would not otherwise have had, that is to say, had constituted it a quasi arbitrator from whose jurisdiction the parties could not appeal. But it is shewn by *Rhodes* v. *Airedale Drainage Commissioners* (1) that a

(1) 1 C. P. D. 402.

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reference under the Lands Clauses Consolidation Act, 1845, does fall within the Common Law Procedure Act, 1845, s. 5, and that the arbitrators have power to state a case for the opinion of the High Court. Therefore the case before us was stated not pursuant to an authority given by the consent of parties, but under an authority which the Common Law Procedure Act, 1854, s. 5, conferred upon the umpire. The Queen's Bench Division having exercised the jurisdiction which they had without the consent of the parties, their decision on the matter is, on a fair construction of the Supreme Court of Judicature Act, 1873, s. 19, open to an appeal before us. It can hardly be maintained that the decision of the Queen's Bench Division is not an "order" within that enactment, for we have before us what is, at least in form, an order directing judgment to be entered for the claimants for 7060*l.* I repeat the remark which I made in the course of the argument, and which has been approved of by Bramwell, L.J.: the Queen's Bench Division either had or had not power to make the order appealed from: if they had not, they exceeded their jurisdiction, and the party against whom it was made may be heard in this Court to complain of it; if there was not an excess of jurisdiction, the party dissatisfied with the order may examine before us the grounds upon which it was made.

The Court proceeded to hear the argument upon the merits.

Nov. 26, 27. *J. Brown, Q.C.*, and *J. Edwards, Q.C.* (*W. Graham*, with them), for the company. As to the first question put by the umpire, the reservation or grant of a "waggon or cart road," contained in the indenture of the 24th of June, 1851, does not enable the claimants, who claim through J. E. Heathcote, to lay down a railroad or tramway. The words are not wide enough, and the stipulation by Heathcote to keep the way in repair shews that it was intended for the use of other persons besides himself, namely, Cooper and those claiming through him; therefore the claimants could not have contructed a railway along it which would have rendered it dangerous to the inhabitants of the neighbouring houses. The language of the indenture above-mentioned and the indenture of the 31st of March, 1859, is very striking;

by the latter the right to lay railways and tramways is conferred in clear terms. The claimants' counsel may rely upon *Dand* v. *Kingscote* (1), where it seems to have been assumed by the Court (p. 197) that an exception and reservation from a conveyance of mines, "with sufficient way-leave and stay-leave to and from" the same, might confer the right to lay a railroad; but that was obviously a very different case, for the "way-leave and stay-leave" were annexed to the mines themselves. Moreover, it follows from the statements in the case that to lay down such a tramway as is suggested must have interfered with the level of the surface of the land subject to the grant of the right of way, and no authority was given by the indenture of 24th of June, 1851, to interfere with the level.

[They also argued that inasmuch as the laying of a railway or tramway from the claimants' pits over the "right of road" to the canal would have involved the crossing of Heathcote Street and an interference with its surface, a public and indictable nuisance would have been created, Heathcote Street being a highway; and that local authorities had no power to legalise a public nuisance; as to this they cited *Reg.* v. *Charlesworth* (2); *Reg.* v. *Train* (3): and that no compensation could be given under the Lands Clauses Compensation Act, 1845, to a claimant on the ground that by the execution of the works he was prevented from deriving profit by the commission of an illegal act; as to this they cited the definition of the right to compensation stated by Lord Cairns, C., in *Metropolitan Board of Works* v. *McCarthy* (4): and that no compensation could be given to a claimant on the ground that he had suffered an injury which was not actionable; as to this they cited *In re Stockport, Timperley, and Altringham Ry. Co.* (5)]

As to the second question put by the umpire, the claimants were empowered by the lease of the 31st of March, 1859, to take and use full and sufficient railways to carry away "the produce of the said mines thereby demised or any other mines." These words are wide enough to authorize the construction of a railway to work the mines demised by Heathcote to the claimants, and

(1) 6 M. & W. 174.
(2) 16 Q. B. 1012.
(3) 2 B. & S. 640; 31 L. J. (M.C.) 169.
(4) Law Rep. 7 H. L. 243, at p. 253.
(5) 33 L. J. (Q.B.) 251.

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there is no reason why any limit should be put to their natural meaning.

Nov. 28. *R. E. Webster, Q.C.*, and *H. Sutton*, for the claimants. As to the first question put by the umpire, the term "waggon-road," used in the indenture of the 24th of June, 1851, is sufficiently wide to include a railway or tramway: *Durham and Sunderland Ry. Co.* v. *Walker* (1); *Senhouse* v. *Christian* (2); *Dand* v. *Kingscote.* (3) The stipulation by Heathcote to repair the right of road was probably inserted to protect Cooper, who, under the Local Government Acts, would be the adjoining owner, and would be held liable by the local authorities to repair it; and as the right of road was granted for Heathcote's benefit, it was only just that the duty to maintain it should by clear words be cast upon him.

[They also argued that even if the railway or tramway proposed to be laid down by the claimants were an indictable nuisance, yet this circumstance did not take away the claim to compensation which does not depend upon rights enforceable by law; as to this they cited *Ex parte Farlow* (4): and further that the umpire had not found that the proposed railway or tramway would be a nuisance; as to this they cited *Matson* v. *Baird* (5): that although the enjoyment of the proposed railroad or tramway might be precarious, the claimants were not by that circumstance deprived of compensation; as to this they cited *Holt* v. *Gas Light and Coke Co.* (6)]

As to the second question put by the umpire, the counsel for the company really argue that they can set off the license to make a railway under the powers contained in the indenture of the 31st of March, 1859, against the deprivation of the right to make a railroad or tramway along the "right of road;" but benefit to one property cannot be set off against injury to another: *Senior* v. *Metropolitan Board of Works*, per Bramwell, B. (7); and it is plain that the claimants cannot make a railway over the

(1) 2 Q. B. 940.
(2) 1 T. R. 560.
(3) 6 M. & W. 174.
(4) 2 B. & Ad. 341.
(5) 3 App. Cas. 1082.
(6) Law Rep. 7 Q. B. 728.
(7) 2 H. & C. 258, at p. 267; 32 L. J. (Ex.) 225, at p. 229.

land belonging to Lawton, in order to carry away the coal obtained from shafts sunk upon Heathcote's land.

J. Brown, Q.C., in reply. The cases relied upon by the claimants' counsel turned upon special circumstances. The general words contained in the indenture of the 31st of March, 1859, must be read in their ordinary meaning; their operation is not to be limited by any arbitrary restrictions.

Cur. adv. vult.

Dec. 10. The judgment of the Court (Bramwell, Brett, and Cotton, L.JJ.) was delivered by

BRAMWELL, L.J. The first question in this case arises thus: The arbitrator finds that the claimants are entitled to compensation, which would be diminished if they were not at the time when their land was taken entitled to make a locomotive railway or tramway such as he mentions; or, if being so entitled, he ought not to take into account the benefit they might get from such railway or tramway. Materially or physically, such railway or tramway could be made; that is to say, there is nothing in the nature of the ground, over which they would go, to prevent their being made, if the ground belonged to the claimants, or they had a sufficient right over it; but he refers to the Court the question of whether they had such right. We are of opinion that they had not. It depends on the reservation or grant in the deed of the 24th of June, 1851. By that the grantor reserves "a right of way along the south-west side of the land conveyed as and for a waggon or cart road." Now it is certain that if such reservation were made, or, if such a grant were made in an ordinary conveyance of land, it would not in ordinary cases grant the right to lay down a line of railway or tramway. But it is said that it is otherwise in this particular case, because the grantor not only reserves this right of way, but also reserves the mines, and that therefore the effect is as though there was a grant or lease of mines, and a grant of a waggon way to work them, and that in such case the authorities shew a railway or tramway might be laid down. Now, we fully and unreservedly admit the authorities, and agree with the reasoning, on which they proceeded; but they do not govern this case. In all of them the way is granted generally, not in a

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particular place; in all the way or ways is a way or are ways to work the mines, and for the use of the grantees only, and their being presently used is contemplated, and in all of them sufficient words are used to include the making of a railway or tramway. None of these matters exist in this case: none of these peculiarities exist here. The words describing the road are a "right of way as and for a waggon or cart way," waggon-way and cart-way being used as equivalent terms. The road is not for the working of the mines: on the contrary the mines are not to be worked from the land conveyed. It is not a road in any place convenient for the mines, but it is a road in a defined place. Heathcote covenants to maintain and keep it in repair, shewing, therefore, it was to be a road for the use of others as well as himself, the ingenious suggestion that that was to guard against Cooper being liable to do so being wholly unfounded. It is also a grant of a way, one end of which runs into a public highway, over which parties do not presumably contemplate making railways or tramways. It is the grant of a way useful for ordinary surface purposes to connect the southern parts of Heathcote's land, out of which a triangular piece was taken, and which Cooper intended to use also himself. This is manifest from Heathcote's covenant to repair. The claimants then are not entitled to make either a railway or tramway over the land in question. A tramway involving raising or lowering the level of the road sufficiently to pass over Heathcote Street cannot be within the grant or reservation; nor can a railway, which, as the arbitrator finds, would take up the whole width of eighteen feet, and be very dangerous to the inhabitants of the houses adjoining in the use of the road, as they have used it, and rightfully used it, hitherto. This renders it unnecessary to consider the question of whether if a railway were made, its being a nuisance (as we hold the arbitrator finds it to be) would preclude his taking its benefits into account. On this, therefore, we say nothing; but are of opinion that the first question must be answered in the negative, and the judgment thereon reversed.

The other question is wholly different and depends on, first, whether the claimants have power to make a rail or tramway over the Lawton estate for the carriage of coals got on the Heathcote estate; secondly, on whether if they have such power, any deduc-

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tion is to be made from the sum otherwise payable to them. We are of opinion that they have this power. Nothing can be larger than the words used: "Full and sufficient rail and other ways to take and carry away the produce of the said mines or any *other mines*." It is admitted that in words this includes the right to take away the produce of the Heathcote mines; but it is said that a limitation must be put on them, or otherwise the produce of mines not adjoining and worked by the claimants could be taken over the Lawton land. But in the first place what is to be done is to be done by the lessees, their agents, servants, and workmen; which limits the power to mines worked by them. But suppose that is not the case; where is the necessity or reason for putting a limitation, where the parties have put none? People do not grant way-leaves over their land gratis for the carriage of coal, whether the produce of mines under those lands or not, and no doubt commonly the leave when granted is limited to the produce of the mines under the land, over which the way goes. But, where is the difficulty or improbability of supposing that a man taking a lease of mines, and knowing he will or may have to make a rail or tramway for removal of the produce, should bargain that he should have power to connect that rail or tramway with other mines, whether worked by him or not, and so diminish the expense he otherwise would be at? What is the limitation here proposed? It is to read after "other mines," the words "and brought to the surface on the Lawton land." Why? The result would be that Lawton coal brought to the surface on Heathcote land could not be taken away over Lawton's land. Are the other powers so limited? May the coke ovens on Lawton's land be used only for the coking of coal brought to the surface on Lawton's land, excluding Lawton's coal brought to the surface on Heathcote's land? It is clear that workmen's houses and standing for gear, tackle, &c., may be on Lawton's land, though the workmen and gear are employed on other mines. Also, "whatever else is necessary or convenient," applies to Lawton and other mines. We see no reason to limit the generality of the words, but the contrary, and on this question are against the claimants.

Mr. Webster, however, for them made a point, apparently not made in the Court below, which at the first view seemed very

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clear in their favour, namely that assuming they had a right to make such a rail or tramway as alleged over the Lawton land, no deduction ought to be made on that account from the loss they sustain if they had no such right. He called it a set-off. He also urged that it was precarious, that the Lawton lease would end before the other; that either lease might be determined or sold, and that if the lessees of the Heathcote lease gained by the use of such a rail or tramway, the lessees of the Lawton lease lost. In order to determine this point, we must see what question the arbitrator asks. It is not whether if the railway or tramway can be constructed over Lawton's grounds there is no loss, but whether he can take the power to do so into consideration, which of course means making allowance for its being more circuitous, for its precariousness, the damage to the Lawton land, and all other matters. We think he can take that into account; not, in a sense, because the claimants are lessees of Lawton; but because the lessees of Lawton's land are able, and ought to be willing to let it be done, and would be, if so doing would be to their gain or lessened loss, unless the railway makes them compensation. In short, it is as though a house in a street were taken, where a man carried on business, and there were other houses in the same street to be had, to which the business could be transferred with no loss of goodwill. In such a case no compensation for goodwill ought to be given. If the rent was greater, that ought to be compensated for: if the lease was shorter, that ought; and if other circumstances of loss or precariousness, they ought. These we assume the arbitrator has allowed for. If the claimants were seised in fee of both properties, there could not be a doubt on the matter. As Mr. Webster admitted, if one door of a house is stopped, and another can be opened conveniently, it must be done; and the loss is the cost of the removal of the door and not of its extinction. So of a field, so of two fields, where access can be got from one through the other. Otherwise the claim would be different, where a man had his land divided in two by a fence, from the case, where it was not so divided. So of mines. But the only difference between a seisin in fee of the whole, and shorter estates under separate leases of the parts, is to introduce the element of precariousness, which ought to be taken into

account indeed in considering the value of the powers, but which ought not to exclude the value altogether. On this ground also we are adverse to the claimants. We do not give any judgment except this, that the first question be answered in the negative, the second in the affirmative. (1)

Appeal allowed.

Solicitors for claimants: *Lewis & Sons, for Sherratt & Son, Kidsgrove.*

Solicitors for North Staffordshire Railway Co.: *Burchells.*

HILL AND OTHERS *v.* THE MANAGERS OF THE METROPOLITAN ASYLUM DISTRICT.

1879 *Jan.* 28.

Nuisance—Hospital for Infectious Diseases—Asylum established by Order of Local Government Board—Liability of Managers—Metropolitan Poor Act, 1867 (30 *Vict. c.* 6).

The defendants, under the powers given them by the Metropolitan Poor Act, 1867, built a hospital which they used for patients suffering from infectious diseases. In an action by adjacent landowners the jury found that the hospital was a nuisance to such landowners:—

Held, by Pollock, B., first, that the Act did not make the defendants mere irresponsible agents to carry out the orders of the Local Government Board so as to exempt them from liability.

Secondly, that they were not exempt on the ground that they acted bonâ fide in the discharge of a duty cast on them by the Act.

FURTHER CONSIDERATION.

The action was tried at the Middlesex Michaelmas Sittings, 1878, before Pollock, B., and a special jury. The plaintiffs were Sir Rowland Hill, William Lund, and Alfred Downing Fripp,

(1) At the conclusion of the judgment a discussion arose as to whether the company were entitled to costs. Sutton, for the claimants, contended that as the company had not before the arbitration offered any sum by way of compensation, they were not entitled to any costs; and he relied upon the Lands Clauses Consolidation Act, 1845, s. 34. Ultimately the Court intimated that they would leave the question to be raised upon taxation, and they declined to give any direction as to costs.

The order of the Court of Appeal (the formal parts being omitted), was drawn up in the following terms: "It is ordered that the judgment of the Court below be reversed on both points, and that the first question be answered in the negative, and the second question in the affirmative, and that this Court doth make no order as to costs."

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owners of land (by separate rights) adjacent to the hospital built and maintained at Hampstead by the defendants, the managers of the Metropolitan Asylum District, incorporated under the Metropolitan Poor Act, 1867 (30 Vict. c. 6). The plaintiffs claimed damages in respect of an alleged nuisance caused by the hospital, and an injunction against the defendants using the hospital for smallpox or scarlet fever or other infectious or contagious diseases.

1878. Dec. 18. The case came on for further consideration.

Herschell, Q.C., Bompas, Q.C., and *Finlay*, for the plaintiffs.

Sir John Holker, Q.C., A.G., Willis, Q.C., C. H. Anderson, and *Proudfoot*, for the defendants.

The learned judge took time to consider his judgment, which sets out the facts and the arguments.

Cur. adv. vult.

Jan. 28, 1879. POLLOCK, B. This action was brought to recover damages in respect of and to obtain an injunction against the recurrence of what the plaintiffs alleged to be a nuisance, affecting their rights by the erection and maintenance of an asylum, consisting of several buildings which were erected and maintained for the reception and treatment of paupers suffering from smallpox. The rights of the three plaintiffs who occupied land and houses adjoining the land and buildings occupied by the defendants were independent and differed in their character. For the purpose of this judgment it will be sufficient to refer to them as set forth in the statement of claim. At the opening of the case it was arranged by counsel that, in the event of a verdict passing for the plaintiffs, the amount of damages should be referred to an arbitrator, and before it had proceeded far it was further agreed that the questions to be tried should be limited to whether the asylum was a nuisance occasioning damage to the plaintiffs, either per se or by reason of the patients coming to or from the asylum; and further, assuming that the defendants were entitled to erect and carry on the asylum, did they do so with all proper and reasonable care and skill with reference to the plaintiffs' rights.

The plaintiffs proved that between December, 1870, and July, 1872, 7352 patients were admitted into the asylum, of whom 1379 died, and that there were for a considerable period as many as 560 patients under treatment. They also adduced evidence to shew that during this period the proportion of smallpox cases in the neighbourhood of the hospital was far larger than in other parts of the parish, and they called a number of medical witnesses, who stated that, in their opinion, the existence of the asylum, as carried on by the defendants, was a source of danger to the neighbourhood and to the plaintiffs in particular, owing to the probable spread of the disease by infection, to the effect of the dead-house, and also to the bringing to and from the asylum of the patients in ambulances, and the visiting of the patients by their relations in cases where death was apprehended. With regard to the plaintiff Sir Rowland Hill some evidence was also given that patients within the grounds of the asylum were allowed to walk so near to the fence which separated the asylum grounds from those belonging to Sir Rowland Hill as to interfere with the safety of the latter. With regard to the plaintiff Fripp, he deposed to having perceived when in his own house a bad smell from the dead-house, whereby his family and others were compelled to leave, and that on a particular day in February, 1871, this smell was specially noticed by himself and his wife, and shortly after she sickened and was attacked by smallpox. He also stated, however, that about the same period Mrs. Fripp had examined an empty ambulance standing in the high road wherein a patient suffering from smallpox had been conveyed.

The defendants called a great number of witnesses, consisting of those who had the superintendence and personal management of the asylum, and also medical men, who stated that in their opinion no danger or disturbance of the plaintiffs' rights was occasioned by the asylum, and that it was built and carried on with all possible care and skill so as to avoid any evil consequences.

At the end of the case on both sides I left to the jury five questions, which were answered as follows:—

1st. Was the hospital a nuisance occasioning damage to the plaintiffs, or either and which of them, per se?

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2nd. Or by reason of the patients coming to, or going from, the hospital?

(A.) 1st and 2nd. It was a nuisance to each of the plaintiffs, per se, and by reason of the patients coming to, or going from the hospital.

3rd. Assuming that the defendants were by law entitled to erect and carry on *a* hospital, did they do so with all proper and reasonable care and skill with reference to the plaintiffs' rights?

(A.) No.

4th. Assuming that the defendants were by law entitled to erect and carry on *this* hospital, did they do so with all proper and reasonable care and skill with reference to the plaintiffs' rights?

(A.) No.

5th. Did the defendants use proper care and skill with respect ambulances?

(A.) No; we consider the ambulances ought to have been disinfected before leaving the hospital.

The jury also expressed their opinion that everything had been done by everybody in the hospital with regard to the internal arrangements, and that great praise was due to the sisters and the hospital authorities.

For the purposes of this judgment, I must assume that the answers thus given are supported in point of fact by the evidence which was laid before the jury; and further, that the direction given to them was proper and sufficient in point of law; any objection upon either head being available only upon motion before the Divisional Court.

At the further argument of the case, which took place before me during the last Michaelmas Sittings, the plaintiffs' counsel contended that the plaintiffs were entitled to have the verdict and judgment entered for them, and also to an injunction, and that the answers of the jury to the first two questions were sufficient to shew that a legal cause of action had been established. Counsel for the defendants denied this, and with respect to the answers to the first two questions asserted that no case had been made out for the following reasons:—

First: They argued that even were it admitted that the building and carrying on of the hospital was a nuisance, and one which

was not authorized and protected by law, the defendants were not liable, because in all that they did they acted simply in obedience to the Local Government Board, whose orders they were bound to obey, and the position of the defendants was likened to that of a constable executing a warrant, and officers carrying out the orders of their government.

Secondly: It was argued on broader and more intelligible grounds that the defendants were not liable, because in all that they did they acted bonâ fide in the execution of a duty, cast upon the Local Government Board and themselves by a statute which required certain things to be done for the public welfare.

Before I consider whether either of the points contended for by the defendants can be supported, it is necessary to examine what is their exact position, both with relation to the Local Government Board and also to members of the public whose property and rights may be affected by their Acts.

The statute by which the defendants are incorporated, and under which they seek to exercise the powers and do the acts complained of, is the Metropolitan Poor Act, 1867 (30 Vict. c. 6), but this statute is only in continuance of a course of legislation commencing with the Poor Law Act of 1834 (4 & 5 Wm. 4, c. 76), whereby a poor law board was first established, and power was given to such board, amongst other things, by ss. 23 and 25, to direct overseers or guardians to enlarge or alter workhouses, according to such plan and in such manner as the board should deem most proper. Similar powers will also be found in the Poor Law Act of 1844 (7 & 8 Vict. c. 101), whereby the Poor Law Board is authorized to order district boards to purchase, hire, or build buildings for asylums or schools.

The Act of 1867 is limited to the metropolis, and provides by s. 5 for the establishment of asylums for the reception and relief of "sick, insane, or infirm paupers," chargeable in the metropolitan unions. This is carried out by the formation of asylum districts, and the constitution of a body of managers for the asylum of each district, and by directing (s. 7) that "for each district there shall be an asylum or asylums as the Poor Law Board from time to time by order direct." By s. 15: "The Poor Law Board may from time to time by order direct the

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managers to purchase, or hire, or to build, and (in either case) to fit up a building or buildings for the asylum of such nature and size, and according to such plan and in such manner as the Poor Law Board think fit, and the managers shall carry such directions into execution;" and by s. 16, "The managers shall have for the purposes of the asylum the like powers as are for the time being vested in guardians of unions or parishes in the metropolis relative to the purchase or hiring of lands or buildings." The following sections are also material: Sect. 20: "The managers shall from time to time provide for the asylum necessary fixtures, furniture, and conveniences, and such as the Poor Law Board from time to time by order direct." Sect. 21: "The mode of admission of persons into the asylum shall be such as the Poor Law Board from time to time by order direct." Sect. 22: "The managers shall have the like powers as guardians for the relief, maintenance, and management of the inmates of the asylum, and shall from time to time provide such medicines, appliances, and requisites for the medical and surgical care and treatment of the inmates, and cause the same to be furnished and used according to such rules as the Poor Law Board from time to time by order direct." Sect. 51 provides that "the provisions of the Act 5 & 6 Wm. 4, c. 69, to facilitate the conveyance of workhouses and other property of parishes, and of incorporations or unions of parishes in England and Wales relative to the acquisition of sites or buildings for workhouses, and of all Acts extending or amending the same, shall apply to lands and buildings required to be purchased, hired, or otherwise acquired for any of the purposes of this Act, and shall have effect as if managers under this Act were guardians, and as if an asylum or dispensary were a workhouse." Sect. 53: "So much of the Lands Clauses Acts as relates to the purchase of lands otherwise than by agreement shall not be put in force except for the purchase of lands for the purpose of enlarging a workhouse, hospital, or school existing at the passing of this Act, and then not without a previous order of the Poor Law Board directing such purchase." By the Local Government Board Act, 1871 (34 & 35 Vict. c. 70), the power and duties vested in the Poor Law Board are transferred to the Local Government Board which was established by that Act.

It will be seen from these provisions that the scope and intention of the Act is to create and carry on within the metropolis asylums for the sick, insane, or infirm, by district managers under the direction and control of the Poor Law Board, much in the same way as workhouses, asylums, and schools had been before carried on by guardians and district boards; and it is observable that the only reference to smallpox is contained in s. 69 which provides for the repayment out of the common poor fund of certain expenses, including those incurred "for the maintenance of patients in any asylum specially provided under this Act for patients suffering from fever or smallpox."

It is under this statute that the defendants were appointed and have acted, and it is under the provisions contained in it, and under the orders of the Local Government Board made in pursuance of it, which were given in evidence at the trial, that the defendants seek to shelter themselves, upon the ground that they acted only as the innocent agents of a public board, and in pursuance of their orders carried out what they have done, and therefore are irresponsible. I am unable, upon what seems to me to be a fair construction of the statute and a proper appreciation of its meaning, to arrive at this conclusion. Upon comparing ss. 15 and 16, it is clear that whereas the former empowers the Poor Law Board to direct the managers to purchase, hire, or build buildings for the asylum, by the latter section the managers alone have the power, similar to that vested in guardians of unions or parishes in the metropolis, relative to the purchase of lands; and, as far as I can gather, the policy and provisions of the Poor Law Acts, beginning with 59 Geo. 3, c. 12, s. 8, and continued and enlarged by 5 & 6 Wm. 4, c. 69, s. 4, and 5 & 6 Vict. c. 57, s. 16, have been that formerly churchwardens and overseers, and now guardians, should be the persons to acquire and hold land or buildings required for workhouses, hospitals, or other like purposes, although since the establishment of the Poor Law Board the guardians must exercise their rights under the control of the Poor Law Commissioners. It would appear from these and the other sections of the Act of 1867 that, although the intention is clear that the Poor Law Board are to have, so far as is possible, the ultimate control of, and to give their sanction to, all that is done,

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the managers are the body who have power, subject to the order of the board, to take and hold land, and it is they who, subject to such order, are to purchase, hire, or build, and to fit up the asylum, to provide the fixtures, conveniences, and medicine, and moreover they are to have the like powers as guardians for the relief, maintenance, and management of the inmates, and in the appointment, control, and payment of officers.

All these provisions appear to shew that the asylum managers have authority and power vested in them involving a discretion, and that it could not have been the intention of the legislature to make them mere irresponsible instruments to carry out the orders of the Poor Law Board. It is quite true that each act that was done by the defendants with reference to the formation of the asylum, and in particular the purchase of the land whereon it was built (which was authorized by an order dated the 13th of February, 1868), was done by the express directions of the Local Government Board; but these directions must be taken with reference to the statutable powers and duty which are conferred upon the two bodies respectively, and cannot be so dealt with as to vary the provision of the Act, or to enlarge or cut down the responsibilities which arise out of anything done by the board or the managers, whose acts must be dealt with as referable to the legal right that is vested in them.

The first point made by the defendants is, so far as I can find, wholly new, and were it tenable would lead to very serious consequences as affecting the rights of property; for it amounts to this, that a body of managers, constituted for the purpose of carrying out a public object under the direction and supervision of a public department, may do acts which are admitted to be a nuisance and injurious to the owners of neighbouring property, and are also admitted to be unauthorized by law, and yet not be liable, because they did them by the mandate of the department under which they act.

In dealing with a contention so novel in character and so serious in its consequences, it will be well to examine shortly the only principle and authorities which are said to be analogous. The immunity of ministerial officers for acts committed by them has long been established, and is founded upon the clearest principles

of reason and justice, namely, that the officer of a court is bound to obey the writ of a court acting within its jurisdiction, and has no means of ascertaining whether it issues upon a valid judgment or not; moreover, he is punishable if he does not so obey, and it would be unjust that a man should be punished if he does not do a thing, and liable to an action if he does do it. This was clearly pointed out by Willes, C.J., in *Moravia* v. *Sloper* (1), and in the judgment of the Court of Queen's Bench in *Andrews* v. *Marris.* (2) In the present case, whether the defendants were bound to obey the orders of the Local Government Board would depend upon whether those orders were legal or not, and therefore to say that the defendants were bound to obey such orders is to beg the question.

The exemption from liability of officers carrying out government orders has always been rested upon the ground that their conduct under such circumstances is an act of state, for which, on grounds of public policy, they cannot be made liable.

In the present case, assuming that the Local Government Board were not authorized by the Act of 1867 to do the acts of which the plaintiffs complain, the defendants were bound to inquire into their own legal position, and were also bound to take care that they so exercised their rights as not injuriously to affect the rights of others, and they are in this respect in the same position as all other persons are by whose wrongful acts a nuisance is created.

The second ground upon which the defendants rest their case involves a much more important question; namely, whether the defendants are protected in doing what they did by the provisions of the Act of 1867. That there are no provisions in that Act requiring them to build the very hospital and on the very site, and to carry it on in the very manner in which it was carried on, was admitted. Had this been so the case would have come within the well known rule that if the legislature authorizes the doing of a particular thing it cannot be wrongful, which is constantly acted upon where the construction of roads, railways, canals, and other public works has been authorized by Act of Parliament. But it was said that looking at the purview and general intent of the Act, and the fact that it was passed with the view of obviating or at

(1) Willes, 30. (2) 1 Q. B. 63.

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least lessening, a great public danger, the statute must be construed in a liberal spirit, and so as not unduly to place difficulties in the way of those to whom its execution is entrusted. With regard to this last argument, if it means that this statute is to receive a construction different to what would be put upon a statute authorizing the carrying out of any other public work, I see the greatest difficulty in giving effect to it, for nothing would be a more dangerous doctrine, or one more contrary to the true rules of construction, than that which required or allowed a judge to give an effect to the same words wider or narrower in proportion, as he might think the general object of the Act in which they were found of great or small public importance. The principle is as was said by Blackburn, J., in the *Mersey Docks Trustees* v. *Gibbs* (1) "That the act is not wrongful, not because it is for a public purpose, but because it is authorized by the legislature." Moreover when stress is laid upon the general prevalence of smallpox in the metropolis, and the desirability of removing patients suffering from it to the hospital, it must be remembered that there is nothing in the general scope of the Act or in any particular provisions of it that points specially to smallpox; the class for the reception and relief of whom the Act professes to provide asylums is, "the sick, insane, or infirm," or other class or classes of the "poor," &c. There is another consideration which also affects the question at issue. The dispute here is not between the Asylum Board and any person or body of persons with whom any relation is established by the statute. It is not as though the persons complaining of the acts of the board were officers of the asylum or patients, in which case it might fairly be said that if there were two ways of carrying out the intention of the statute or orders of the Local Government Board it must be assumed that a discretion was vested in the Asylum Board to do that which seemed to them best under all circumstances, though possibly not best for some particular person or persons. Here the plaintiffs are strangers to the defendants and to the whole matter over which they have control, their rights are simply those of owners and occupiers of land, and they assert that they have suffered damage by reason of the defendants acquiring land adjoining, and so using it as to create an actionable nuisance.

(1) Law Rep. 1 H. L. 112.

To meet this therefore, the defendants must certainly make out a clear case of right, for if they could at any place and in any manner carry out the requirement of the Act without creating a nuisance, it cannot be supposed that the legislature armed them with an option so to perform their duty as to create or not create a nuisance affecting the right of others, as it might seem to the defendants or the Local Government Board fitting and proper with reference to the internal advantage or economy of the asylum. If this principle were once admitted it is difficult to see where any line could be drawn. A statute which justified the defendants in creating a nuisance to neighbours, would seem by parity of reasoning to justify the diminution of light or air, and this, although the statute contained no provisions for compensating those who might be injured by its operation.

The real question, therefore, seems to come to this, looking at that which was done by the defendants, and which the jury have found to be a nuisance injurious to the plaintiffs' rights, can it be truly said that the doing of it was in substance and impliedly though not in express words authorized by the statute? Now no evidence was tendered by the defendants to shew, nor was there any finding of the jury, that the defendants could not have carried out what the legislature intended them to carry out without necessarily creating a nuisance. It is clear from the facts proved that no such conclusion could have been arrived at, for although to build and carry on the hospital, where and in the manner in which it was built and carried on, and with its large number of patients may have been the more proper and convenient mode of complying with the intention and provisions of the Act, in so far as the patients, the officers, medical staff, and nurses were concerned, and the least expensive to the ratepayers, it cannot be assumed that, if several smaller hospitals had been built instead of one large one, or if a larger area around the hospital had been obtained, that which has been found to be a nuisance might not have been avoided.

I have dealt with the case hitherto apart from authority. Several cases were, however, cited in argument, and so far as these afford any assistance they appear to me to support the view which I have taken. In some of them the nuisance complained of was

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considered to have been expressly authorized by the legislature. Thus in *Rex* v. *Pease* (1), where a company was empowered to make a railway according to a deposited plan and to use locomotives thereon, and the jury found that the engines used were of the best construction known, and that the defendants used due care and diligence in the using of them, the Court held that, inasmuch as unqualified power was given to use the engines on the particular railway, the defendants were not liable to be indicted for a nuisance, and that it must be presumed that the legislature intended that those of the public who used an adjacent highway should sustain some inconvenience for the sake of the greater good to be obtained by those who used the railway. The same principle was followed in *Vaughan* v. *Taff Vale Railway* (2), and by the House of Lords in *Caledonian Ry. Co.* v. *Ogilvy* (3), and *Hammersmith Ry. Co.* v. *Brand.* (4) Where the nuisance is not shewn to be the absolutely necessary consequence of what is authorized by statute, the courts have been slow to admit of any argument by which it has been contended that the creation of a nuisance must be taken to have been implied. This appears from what was said in the *Queen* v. *Bradford Navigation Co.* (5), and by the judgment of the Court of Appeal in the *Attorney General* v. *Colney Hatch Lunatic Asylum* (6); and in *Clowes* v. *Staffordshire Potteries Waterworks Co.* (7), where Mellish, L.J., dwells much upon the absence of any compensation clause, as indicating that the legislature could never have intended to justify an injury to a private right. I agree also with what was said by Fry, J., in the *Attorney General* v. *Gas Light and Coke Co.* (8), that the full burden of proof in such a case rests entirely upon those who say that they cannot, without creating a nuisance, do a thing which they are bound to do. Whether the proposition be so framed as to assert that the legislature never intended the act complained of to be done, or to say that those to whom the legislature has intrusted the carrying out of a public object could do so without doing that particular act, the result is the same. In *Geddis* v.

(1) 4 B. & Ad. 30.
(2) 5 H. & N. 679; 29 L. J. (Ex.) 247.
(3) 2 Macq. 229.
(4) Law Rep. 4 H. L. 171.
(5) 6 B. & S. 631.
(6) Law Rep. 4 Ch. 146.
(7) Law Rep. 8 Ch. 125.
(8) 7 Ch. D. 217.

C.P.C. 6 June 15. 1899.

Proprietors of Bann Reservoir (1), Lord Blackburn says: "I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized if it be done without negligence, although it does occasion damage to any one; but an action does lie for doing that which the legislature has authorized, if it be done negligently. And I think that, if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at Common Law, the damage could be prevented, it is within this rule, 'negligence,' not to make such reasonable exercise of their powers. I do not think that it will be found that any of the cases (I do not cite them) are in conflict with that view of the law." My attention was particularly called by the Attorney-General on behalf of the defendants to the judgment of the Master of the Rolls in *Hawley* v. *Steele* (2), declining to grant an injunction on motion to restrain a general in her Majesty's army, and the officers under his command, from causing or permitting rifle practice on a common in close proximity to the plaintiff's house, which as he alleged, was a serious nuisance and occasioned damage to his property. The principle upon which this injunction was refused, has no doubt a material bearing upon the present case, and I in no way differ from what was there said by the Master of the Rolls, but I am unable to follow the course of argument by which it is submitted that any true analogy exists between the case of lands vested in the Secretary of State for War, "for the purposes of the defence of the realm," and a power given to acquire or build an asylum for sick paupers. In the first case it would be extremely difficult to contemplate the user of land for military purposes which did not carry with it the right to fire guns. In the present case, upon the materials presented to me, the inference does not seem to follow that an asylum for sick paupers including those suffering from smallpox cannot be maintained without the creation of a nuisance.

I have dealt thus far with the answers given by the jury to the first two questions. The remaining findings assume the legal right of the defendants to erect and carry on the asylum, but raise the question whether the defendants in so doing used all proper

(1) 3 App. Cas. 430. (2) 6 Ch. D. 521.

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and reasonable care and skill with reference to the plaintiffs' rights. Here, again, I must assume that the jury received a proper direction, and that the findings were not contrary to the evidence adduced, and the only question that remains is whether that evidence disclosed any legal cause of action.

As to this counsel for the defendants argued that the evidence for the plaintiffs was too general in its character, and that although it might establish that some nuisance existed, it was not shewn that the plaintiffs had sustained any special damage in consequence of it. I cannot think that either of these contentions is established.

As to the first of these, some of the plaintiffs' witnesses spoke clearly to the creation by the asylum of a nuisance not merely affecting comfort but endangering health, and as to much of their evidence it would be impossible to say to what extent it arose necessarily from the existence of the asylum or from its being carried on in a manner more injurious to the plaintiffs than it might have been. This would be and must have been a matter of inference for the jury.

Upon the second point the plaintiffs would be entitled to a verdict, and at least nominal damages, if the jury should think the nuisance created by the defendants rendered the enjoyment of life or property unsafe, although no special damage was proved.

The result of the conclusion at which I have arrived is that the plaintiffs are entitled to have the verdict entered for them, and also to judgment with costs.

With respect to the injunction which is sought I propose to adopt the course which was followed in the *Attorney General* v. *Colney Hatch Lunatic Asylum.* (1) I therefore grant an injunction to restrain the defendants, their servants, or agents, from carrying on the asylum so as to be a nuisance to all or any of the plaintiffs, and I suspend the issue of it for three months with liberty to either side to apply.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Bischoff, Bompas, Bischoff, & Co.*
Solicitors for defendants: *Few & Co.*

(1) Law Rep. 4 Ch. 146.

THE QUEEN *v.* THE GREENLAW ROAD TRUSTEES.

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March 31.

Highway—Turnpike Road—Toll-house "useless and no longer required for purposes of Road"—4 Geo. 4, c. 95, s. 57.

A toll-house erected by turnpike trustees on a highway was for some years used for the collection of tolls. The toll-bar attached to the house was then taken down, and for twelve years subsequently no toll had been collected at the house, which had been in the occupation of a man employed by the road surveyors for the repair of the road. It was stated by the trustees that they might, at some future period, again require to use the house on the collection of tolls:—

Held, that the owner of the land adjoining was entitled to a mandamus to compel the trustees to pull down the toll-house and remove the materials, for it must be taken to have become "useless and no longer required for the purposes of the road" within the meaning of 4 Geo. 4, c. 95, s. 57.

RULE calling on the Right Hon. the Earl of Home and others, trustees of the Greenlaw Turnpike Trust, to shew cause why a mandamus should not issue directed to them, commanding them to cause a toll-house situate between Coldstream Bridge, Berwick, and Cornhill, Northumberland, with the outhouse or outhouses attached thereto, to be pulled down, and the materials to be sold or removed, pursuant to 4 Geo. 4, c. 95, s. 57.

It appeared from affidavits, that in 1851 a toll-house, as described in the rule, was erected by the trustees, in the exercise of the powers conferred upon them by 9 & 10 Vict. c. xlvi., and the General Turnpike Acts, upon the highway between Coldstream Bridge and Cornhill, and that tolls were taken there till 1866, when the toll-bar attached to the house was removed, and no toll had since been collected there. The house had since been in the occupation of a "surfaceman," or man employed to keep the road in repair under the surveyor of the trust; and it was stated by the trustees that it was probable that they might be compelled to replace the toll-bar for the purpose of taking tolls.

The rule was obtained on behalf of the trustees of the will of H. J. Collingwood, as proprietors of the land adjoining the roadway.

Candy, shewed cause. It is not shewn that the toll-house is useless and no longer required for the purposes of the road within

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the meaning of 4 Geo. 4, c. 95, s. 57. (1) It is for the turnpike trustees to decide whether it is still useful for the purposes of the road, and in the literal sense of the term it is still useful, being occupied for a purpose beneficial to the road, and it may at any moment be required as a toll-house.

Ridley, in support of the rule. Under 3 Geo. 4, c. 126, s. 89, land in the possession of turnpike trustees, which is not wanted for the purposes of the roads, is to be sold, the first offer to be made to the original or adjoining owners; and by s. 118, no dwelling-house can be erected so as to reduce the breadth or obstruct the limits of a turnpike road. The trustees were, therefore, only justified in maintaining the house in its present position so long as it was used as a toll-house, and to use it as a residence for the man employed in mending the road is illegal. The meaning of the expression "required for the purposes of the road" may be explained by the observation of Bramwell, L.J., in *Hooper* v. *Bourne* (2): "Land is 'required' by a railway company where they have actually used it for laying down the rails over which the trains carrying their traffic pass and re-pass, or for erecting works necessary in conducting their business." The trustees are unable to say when they will resume taking toll at the house.

COCKBURN, C.J. I think this rule must be made absolute. The first question is whether this is a toll-house which has become useless, and is no longer required for the purposes of the road, that is, what is the proper construction to be put upon the

(1) By 4 Geo. 4, c. 95, s. 57: "Where any toll-house or toll-houses standing on or adjoining any turnpike road, and which shall have been erected by, or vested in, the trustees of such road, shall become useless and be no longer required for the purposes of such road, it shall not be lawful for the trustees of such road to sell or dispose of such toll-house or toll-houses; but in every such case the trustees of the road on which such toll-house or toll-houses no longer required shall stand, shall cause such toll-house or toll-houses, with the outhouses attached or belonging thereto, to be pulled down, and the materials thereof to be sold or removed, and the site of such toll-house or toll-houses so pulled down, together with the gardens and appurtenances thereunto belonging, may then be sold by the trustees in the same manner as and under the same regulations in the said recited Act and this Act contained with respect to any land or ground not wanted for the purposes of the road."

(2) 3 Q. B. D. 258, at p. 274.

words "required for the purposes of such road?" It is quite clear that this cottage has ceased to be for the present, and, as far as we can see, for the future, useful as a toll-house. It is no longer used for that purpose, and I do not think that in the answer made to this application the turnpike trustees have shewn anything which could properly lead us to believe that there is anything serious in their vague suggestion that they may again set up the toll-bar, and use this house as a toll-house. I infer, therefore, that it has become useless as a toll-house. Then it is said in answer to the application, although it has become useless as a toll-house, it is still required for the purposes of the road, because it is used as a habitation for certain persons employed on the road. Then we have to consider whether the purpose for which it is now applied, and for which it is said that it will continue to be required, is one which can properly come within the terms used in s. 57, namely, a toll-house required for the purpose of the road. In order to determine that I think we are very properly referred to 3 Geo. 4, c. 126, s. 118, which appears to me to make all the difference in the case. This section makes it perfectly clear that if the trustees had taken on themselves to erect this house, not as a toll-house, but as a house required for other purposes connected with the road, they would have obstructed the road, and they would have acted in direct contravention of the section, and the neighbouring proprietor would have a right to say, "You are acting in contravention of the statute. You must take that house down, or I shall take legal proceedings to compel you to do so." The moment it ceases to be a toll-house, and yet remains as a continuing obstruction of the road, it appears to me that that can no longer be a lawful purpose to which it is applied, and therefore on the proper construction of 4 Geo. 4, c. 95, s. 57, which must be taken when it speaks of the purposes of the road to mean lawful purposes, it can be no longer considered to be applied to a lawful purpose.

The only remaining question is whether the neighbouring proprietor has a right to call upon the trustees to remove the obstruction by taking down the house? For the reason I have just thrown out I think he has. He has a right to have the road unobstructed which he has occasion to make use of, and we

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may very fairly assume that the neighbouring proprietor has occasion to use it. He has therefore a right to have the road unobstructed, and this toll-house obstructs it. It was not unlawful so long as it was used as a toll-house, because when toll has to be taken the road is properly obstructed for the purpose of taking the toll; but it becomes unlawful if it is used for any other purpose not connected with the taking of the toll.

MELLOR, J. I am of the same opinion. For some little time I hesitated as to the construction of the 57th section, but I am satisfied, on looking at the words more closely, that the house has become useless, and is no longer required for the purposes of such road within the meaning of that section. The contention on the part of the trustees is, though it is not required as a toll-house, it is required for the habitation of the person who is employed on the roads, as if he were there for a road purpose. But when we consider s. 118 in the earlier Act, it seems to me that, excepting for the purpose of a toll-house or the appurtenances necessary to a toll-house, the trustees had no right to erect such a building at all. Then it is clear that under the 57th section their course of proceeding is to pull down that which is no longer useful for the road, but which has become, by virtue of its not being useful for the road, a nuisance. They may sell it without pulling down the house, but the object of that section is—you shall not allow something to remain standing to the obstruction of the road, and you shall not sell it with the obstruction upon it; but you must pull down the obstruction first of all, sell the materials, and then you may proceed to sell the vacant land, and you must give the adjoining landowner the right of pre-emption.

Rule absolute.

Solicitors for prosecution: *Shum, Crossman, & Co., for Fenwick & Manisty, Newcastle-on-Tyne.*

Solicitor for turnpike trustees: *Adam Burn.*

THE LONDON SCHOOL BOARD, APPELLANTS; JAMES HARVEY, RESPONDENT.

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May 7.

Elementary Education Act (39 & 40 *Vict. c.* 79), *ss.* 11, 12—*Evidence—Conviction for Non-compliance with Attendance Order.*

An order of a court of summary jurisdiction under the Elementary Education Act, 1876, imposing a penalty on the parent of a child for non-compliance with a previous order for the attendance of the child at school, may be proved in subsequent proceedings by the minute books of the court containing an entry of the order; and it is unnecessary to produce a copy of the order signed by the clerk of the peace or other officer of the sessions.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43.

The respondent, on the 4th of September, 1877, was summoned upon the complaint of the local authority, under 39 & 40 Vict. c. 79, s. 11 (1), for habitually and without reasonable excuse neglecting to provide elementary education for his child, and an order was made for the attendance of the child at school.

On the 27th of March, 1878, he was again brought up on a summons, under s. 12, for non-compliance with the above order, and fined 3*s.* and 2*s.* costs.

The following is a copy from the books of the court of the only minute or memorandum made at the time of imposing the penalty:—

"Tuesday, 27th March, 1878. Form of note or memorandum kept pursuant to 2 & 3 Vict. c. 71, s. 44:—

Name of Complainant.	Name of Defendant.	Date of Application.	Substance of Charge.	What Process, Summons or Warrant.	Result.
William Hetherington.	James Harvey.	20th March.	Education Act.	Summons.	3*s.* and 2*s.* costs or 5 days."

On the 15th of June, 1878, the respondent was brought up upon a summons, under s. 12, sub-s. 2, charged with a second non-compliance with the order.

(1) 39 & 40 Vict. c. 79, s. 11: "If the parent of any child above the age of five years who is under this Act prohibited from being taken into full time employment, habitually and without reasonable excuse neglects to pro-

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It was proved that the order of the 4th of September, 1877, had been duly served upon him, and that his child was not attending school in accordance with the order.

To prove the previous case of non-compliance with the order it was proposed to call the clerk of the court, in whose custody was the book containing the memorandum of the 27th of March, 1878, to produce the book; but the magistrate was of opinion that the first adjudication could only be proved like any other summary conviction. The order of the 17th of March, 1878, had never been drawn up, for it is not the practice in the metropolitan police courts to draw up summary convictions without a special request, which is rarely made. The magistrate thereupon dismissed the summons on the ground that the previous case of non-compliance had not been proved.

The question for the opinion of the Court is whether, in order to prove their case, it was necessary for the appellants to give in evidence a copy of the conviction signed by the clerk of the peace or other officer of the quarter sessions.

Holl, Q.C. (*Douglas Walker*, with him), for the appellant. The order in question was sufficiently proved by the minute book. It is not a conviction, it is merely a penalty imposed as a means of securing compliance with the attendance order. It has never been the practice to require such strict proof of orders as of convictions; but even in the case of convictions minutes have been received in evidence when it has appeared not to be the practice of the court to draw up the records in form: *Rex* v. *Hains* (1); *Reg.* v. *Newman.* (2)

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vide efficient elementary instruction for his child . . . . it shall be the duty of the local authority, after due warning to the parent of such child, to complain to a Court of summary jurisdiction; and such Court may, if satisfied of the truth of such complaint, order that the child do attend some certified efficient school."

Sect. 12: "Where an attendance order is not complied with without any reasonable excuse . . . . a Court of summary jurisdiction, on complaint made by the local authority, may, if it think fit, order as follows:—

"(1.) In the first case of non-compliance . . . . impose a penalty not exceeding, with the costs, five shillings.

"(2.) In the second or any subsequent case of non-compliance with the order, order the child to be sent to a certified industrial school; and further, in its discretion, inflict any such penalty as aforesaid."

(1) Comb. 337.

(2) 2 Den. C. C. 390.

No counsel appeared for the respondent.

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COCKBURN, C.J. I have no doubt whatever that the minute-book was sufficient evidence.

LOPES, J., concurred.

Judgment for the appellants.

Solicitors for appellants: *Gedge, Kirby, & Millett.*

[IN THE COURT OF APPEAL.]

REDONDO *v.* CHAYTOR AND ANOTHER.

May 27.

Practice—Security for Costs—Foreigner residing temporarily in England.

A foreigner usually residing abroad, who is temporarily residing in England for the purpose of enforcing a claim by action, cannot be called upon to give security for costs.

ACTION to enforce payment of an annuity from the defendants who were the executors of one Foster, and he had promised the plaintiff that in consideration she would go abroad and continue to reside abroad, he would pay her a certain annuity by instalments so long as she continued to reside abroad; and the plaintiff did go abroad, and had always continued to reside abroad, and she was in England at present temporarily for the purpose of carrying on the action.

A summons was taken out by the defendants before the master calling on the plaintiff to give security for costs. It appeared from the affidavits filed on behalf of the defendants that the plaintiff was a native of Spain, and had a permanent residence abroad, and that she had in conversation with certain persons stated her intention of going abroad as soon as the present action was decided. It appeared by the plaintiff's affidavit that she was residing at 30, Frith Street, Soho, and she stated that she had no present intention of leaving the country.

The master made no order on the summons. On appeal to a judge he made an order on the plaintiff that she give security for costs, and that in the meantime all proceedings be stayed. On appeal to the Common Pleas Division the Court rescinded the order of the learned judge.

The defendants appealed.

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May 17. *Fullarton*, for the defendants.

Lumley Smith, for the plaintiff.

In addition to the cases mentioned in the judgment the following were cited:—*Goodwin* v. *Archer* (1); *Adderly* v. *Smith* (2); *Duke de Montellano* v. *Christin* (3); *Pray* v. *Edie* (4); *Jacobs* v. *Stevenson* (5); *Nelson* v. *Ogle* (6); *Naylor* v. *Joseph* (7); *Gurney* v. *Key* (8); *St. Leger* v. *Di Nuovo* (9); *Swinbourne* v. *Carter* (10); *Westenberg* v. *Mortimore* (11); *Raeburn* v. *Andrews* (12); *Ogilvie* v. *Herne* (13); ——— v. ——— (14); *Drummond* v. *Tillinghist.* (15)

Cur. adv. vult.

May 27. THESIGER, L.J. Although it is proposed that I should deliver my judgment first, yet there is no difference of opinion amongst us.

The question raised in this case is whether the plaintiff ought, under the circumstances, to give security for costs. The action was brought by a foreigner to enforce payment of an annuity from the executors of one Foster, under an alleged agreement. The statement of claim alleges that since the agreement the plaintiff has been resident abroad until she temporarily came to England to enforce her claim. On the facts stated in the affidavits, it is enough to say that I am of opinion that the plaintiff is really in the country merely for the purpose of the suit, and probably will go abroad if she obtains a judgment in her favour, and if judgment is given against her she will leave the country, under circumstances which will prevent the defendants from availing themselves of any process by which they can recover costs, and consequently unless there is a settled rule of practice to the contrary, there is some reason why the plaintiff should be called upon to give security. But the Common Pleas Division has decided that, whether the plaintiff be an Englishman or a

(1) 2 P. Will. 452.
(2) 1 Dicken. 355.
(3) 5 M. & S. 503.
(4) 1 T. R. 267.
(5) 1 B. & P. 96.
(6) 2 Taunt. 253.
(7) 10 Moo. 522.
(8) 3 Dowl. 559.
(9) 2 Scott, N. R. 587.
(10) 23 L. J. (Q.B.) 16.
(11) Law Rep. 10 C. P. 439.
(12) Law Rep. 9 Q. B. 118.
(13) 11 Ves. 598.
(14) 2 Dicken. 775.
(15) 16 Q. B. 740.

foreigner, if at the time of the application by the defendant the plaintiff is within the jurisdiction of the Court, though only for a temporary purpose, the Court have no power to order him to give security, merely on the ground that he is usually resident abroad.

To shew that there is such a settled rule of practice it is necessary to go into the cases in detail. We there find that in favour of the view that such security ought not to be given there are five distinct decisions. In 1815 there was the case of *Ciragno* v. *Hassan* (1): in 1819 of an *Anonymous Case* (2); in 1827 the case of *Willis* v. *Garbutt* (3); in 1840 *Dowling* v. *Harman* (4); and lastly, in 1852, that of *Tambisco* v. *Pacifico.* (5) So far I have mentioned only common law authorities. In addition to the decisions we have the opinions of the text-books; Chitty's Archbold and Lush's Practice are to the same effect, though they seem to leave the matter in some doubt, founded on a supposition that though the general current of authority is in favour of the view taken by the Common Pleas Division, yet there are some decisions to the contrary. There are three decisions which appear to be in conflict with the authorities I have mentioned, but two of these are really of no authority on the point, viz., *Naylor* v. *Joseph* (6) and *Gurney* v. *Key.* (7) For, when we look into these cases, it appears that though the plaintiff may have been within the jurisdiction at the time of action brought, he was clearly out of the jurisdiction when the application was made; so that those two cases are not inconsistent with the general rule. There is therefore, in point of fact, only one case which can fairly be cited in favour of the defendants, that of *Oliva* v. *Johnson.* (8) It is to be observed that though that case was decided after the case of *Ciragno* v. *Hassan* (1) and the *Anonymous Case* (2), neither of these two cases was cited; whereas although *Oliva* v. *Johnson* (8) was not actually cited in *Dowling* v. *Harman* (4), yet, as Martin, B., says in *Tambisco* v. *Pacifico* (5), it is clear that it must have been before the mind of at least one of the judges who decided *Dowling* v. *Harman* (4),

(1) 6 Taunt. 20.
(2) 8 Taunt. 737.
(3) 1 Y. & J. 511.
(4) 6 M. & W. 131.
(5) 7 Ex. 816; 21 L. J. (Ex.) 276.
(6) 10 Moo. 522.
(7) 3 Dowl. 559.
(8) 5 B. & A. 908.

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because he was counsel in *Oliva* v. *Johnson*. (1) And in *Tambisco* v. *Pacifico* (2) the case of *Oliva* v. *Johnson* (1) was discussed, notwithstanding which the general rule was followed. In all those cases it may be observed that the decisions were founded on the well-settled and established practice or cursus curiæ.

It is impossible, in the face of the authorities, to hold that the practice at law was other than what I have stated it to be. But then it is said that a conflict of authority arises if the decisions in Equity are examined. The first of these is the case of *Ainslie* v. *Sims* (3), decided by Lord Romilly in the year 1852. In that case the rule I have laid down was not followed by the Master of the Rolls, and it is to be observed that none of the above-mentioned authorities were cited. But it is remarkable that in the same year *Tambisco* v. *Pacifico* (2) was decided, and in the same year again there was a contrary decision by Wood, V.C., in the case of *Cambottie* v. *Inngate*. (4) He calls attention to the fact that the authorities were not cited before the Master of the Rolls in *Ainslie* v. *Sims* (3), and says: "By the comity of nations a foreigner was entitled to the same relief in a court of justice as a British subject; on quitting the country the same security could be demanded from both of them. In *Willis* v. *Garbutt* (5) Alexander, C.B., says: 'No one can have security for costs until his opponent has quitted the country. We can only enforce an order by staying proceedings until the security is given, and that may be done just as well after he has quitted the country as before.'" But it is said that though Wood, V.C., took that view in 1852, he was of a different opinion in 1858, when he decided the case of *Swanzy* v. *Swanzy*. (6) But it seems to me that he did not withdraw from his former position, nor did he give any opinion that the Master of the Rolls was right, but decided the case on a different principle, viz., that where an action has been brought by a foreigner temporarily resident in England, who for the purpose of misleading the Court gives a false description of his residence, or conceals his true residence, or gives a false name, that is in the

(1) 5 B. & A. 908.
(2) 7 Ex. 816; 21 L. J. (Ex.) 276.
(3) 17 Beav. 57.
(4) 1 W. R. 533.
(5) 1 Y & J. 511.
(6) 4 K. & J. 237; 27 L. J. (Ch.) 419.

nature of a fraud on the Court, and the Court can order the plaintiff to give security for costs. This is shewn by the further observations of Wood, V.C., in *Cambottie* v. *Inngate* (1), who, after referring to the case of *Fraser* v. *Palmer* (2), justifies this decision by remarking that it was not alleged that any fraud upon the Court was contemplated by the plaintiff. *Fraser* v. *Palmer* (2) was a case decided by the Court of Exchequer in Equity, in which Alderson, B., said: "If a plaintiff gives a right description of his place of abode when he files his bill, his circulating about afterwards is immaterial unless he goes abroad. He is still open to the process; it is a different thing if he gives a false statement of his residence, he is then guilty of a fraud upon the Court, and on that ground is made to give security for costs." This explains what Wood, V.C., said in *Swanzy* v. *Swanzy* (3), and the latter part of the judgment shews that the case of *Calvert* v. *Day* (4) is no authority on this question.

So stands the question of authority; and in the face of these authorities we have no course open to us but to dismiss the appeal. We are not called upon to say what, if the matter were now res integra, ought to be the rule, but whether the Court below were right or wrong as to the settled rule of practice. But as there is a strong feeling on the part of one member of the Court that the settled rule is unreasonable, I should like to add a few words on that subject. No doubt in one view of the matter where the plaintiff is a foreigner, and will probably leave the country if unsuccessful, so as to avoid paying costs, it seems rather hard that he should not be called upon to give security, more especially as it is clear that there is no hard and fast rule in the converse case, and when a person usually resident in the jurisdiction is temporarily out of it, the Courts will not compel him to give security. Again, if a person is permanently resident without the jurisdiction, but has property within it, no security will be required; therefore it may be said it would be reasonable that the converse should hold good, and if the plaintiff is only temporarily in England, and will probably go abroad before process can issue against him, he shall be made to give security. But, on the other hand, it may not be convenient to extend the

(1) 1 W. R. 533.
(2) 3 Y. & C. (Ex.) 279.
(3) 4 K. & J. 237; 27 L. J. (Ch.) 419.
(4) 2 Y. & C. (Ex.) 217.

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number of cases in which security for costs can be demanded, and in which the plaintiff can be deprived of his remedy until and unless he can find such security. It may, no doubt, be a hardship on a foreigner, who has come into this country for the bonâ fide purpose of trying a right, to be unable to do so because he cannot give security for costs. And although there are, no doubt, strong reasons on which a change of the law could be urged, I do not wish to be understood as giving an opinion in favour of the change.

BAGGALLAY, L.J. The authorities on the question before us have been so fully examined and explained by Thesiger, L.J., that I propose only to add a few words on the case *Swanzy* v. *Swanzy*. (1) It is well known that in all proceedings in Chancery, whether commenced by bill or petition, it was necessary to state fully in the bill or petition the name and residence of the person instituting the proceedings, and quite independently of whether that person was a foreigner or not or was resident within the jurisdiction or not. If the plaintiff did not correctly state his name and residence in his bill or petition, it was enough to enable the Court to order him to give security for costs. In *Swanzy* v. *Swanzy* (1) residence was incorrectly stated. The plaintiff had taken lodgings at one place under one name and at another place under another name. This was enough to make her liable to give security for costs, independently of any question of residence abroad. The principle always acted on in the Court of Chancery was that laid down by Wood, V.C., in the case of *Cambottie* v. *Inngate*. (2)

BRAMWELL, L.J. I think it is impossible to dissent from the elaborate exposition of the law by Thesiger, L.J., as to the practice of the Courts. I think the rule ought to be different, for the present rule seems to me to work injustice, and is therefere not a proper rule of practice; still, no doubt, it is the settled rule, and this appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *G. S. & H. Brandon.*
Solicitors for defendants: *T. W. Denby & Co.*

(1) 4 K. & J. 237; 27 L. J. (Ch.) 419. (2) 1 W. R. 533.

4 June 1013.

[IN THE COURT OF APPEAL.]

1879
May 2.

SIDDONS *v.* LAWRENCE.

Costs—Rules of Court, 1875, *Order LV.—Jurisdiction of Divisional Court to entertain an Application for Costs after Trial.*

The Divisional Court has under Order LV., an original jurisdiction to make an order to deprive a successful party of the costs of an action tried before a jury.

THIS case is reported 4 Ex. D. p. 177.

MASON *v.* THE WIRRAL HIGHWAY BOARD.
THE NORTH AND SOUTH WALES BANK, GARNISHEES.

May 14.

Practice—County Court, Appeal from—Garnishee Order—"Action"—13 & 14 *Vict. c.* 61. *s.* 14; 30 & 31 *Vict. c.* 142, *s.* 13; 38 & 39 *Vict. c.* 50, *s.* 6.

There is no appeal from a garnishee order under the County Court Rules, 1875, for it is not a decision in an "action" or "cause," within the meaning of the County Court Acts.

Tennant v. *Rawlings*, 4 C. P. D. 133 [as to time for moving by way of appeal from decision of county court judge] not followed.

RULE calling on the plaintiff to shew cause why a garnishee order made by the judge of the County Court of Cheshire, holden at Birkenhead on the 31st of January, 1879, should not be set aside, on the grounds that the garnishees were not indebted to the judgment debtor, and that the money in their hands was not such as could be attached. It appeared that the defendants had applied to the Court within the eight days prescribed by 38 & 39 Vict. c. 50, s. 6, for an order to compel the county court judge to furnish a copy of his notes, which was refused. The notes having subsequently been obtained, the rule nisi was applied for and granted on the 10th of February.

T. H. James, shewed cause. First, the time for appealing by motion had expired on the 10th of February, and could not be extended: *Tennant* v. *Rawlings*. (1)

F. Marshall, for the defendants, was heard against the objection.

(1) 4 C. P. D. 133.

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MASON v. WIRRAL HIGHWAY BOARD.

COCKBURN, C.J. The Court is not agreed upon this point. The delay was unavoidable, for by a rule of practice which we have made, it is necessary in moving ex parte to produce a copy of the county court judge's notes of the proceeding. I think that, upon a fair construction of 38 & 39 Vict. c. 50, s. 6, the person aggrieved may be said to move when he comes to the Court and states that he wishes to do so. The appeal must proceed, leaving the plaintiffs at liberty to go to the Court of Appeal.

MELLOR, J. My impression is, that the appeal being the creature of the statute, the person aggrieved cannot be said to appeal unless he moves within the prescribed period.

T. H. James, further shewed cause. There is no appeal from the order of a county court judge upon a garnishee summons under the County Court Rules, 1875. The Act 38 & 39 Vict. c. 50, s. 6, has not enlarged the right of appeal from county courts: *Cousins* v. *Lombard Bank.* (1) The County Courts Act, 1850 (13 & 14 Vict. c. 61 (2)), which extended the jurisdiction from 20*l.* to 50*l.*, first gave by s. 14 a right of appeal, but this right was expressly restricted to causes of the amount to which jurisdiction is given by the Act. In *Beswick* v. *Boffey* (3) it was held that the claimant in a county court interpleader had no right of appeal because he was not party to a "cause" within the meaning of s. 14. *Fraser* v. *Fothergill* (4) is to the same effect; these decisions leading to the enactment in 19 & 20 Vict. c. 108, s. 68, by which an appeal in replevin and interpleader proceedings is expressly given. It was further decided in *Carr* v. *Stringer* (5)

(1) 1 Ex. D. 404.

(2) 13 & 14 Vict. c. 61, s. 14: If either party in any cause of the amount to which jurisdiction is given to the county courts by this Act shall be dissatisfied with the determination or direction of the Court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any of the superior courts of common law at Westminster.

By 30 & 31 Vict. c. 142, s. 13: An appeal from the decision of a county court on the same grounds, and subject to the same conditions as are provided by 13 & 14 Vict. c. 61, s. 14, shall be allowed in all actions of ejectment, and with the leave of the judge an appeal shall be allowed in actions in which an appeal is not now allowed if the judge shall think it reasonable and proper that such appeal should be allowed.

(3) 9 Ex. 315; 23 L. J. (Ex.) 89.

(4) 14 C. B. 295; 23 L. J. (C.P.) 53.

(5) E. B. & E. 123.

that there was no appeal from the decision of the county court upon an interlocutory matter, such as the taxation of costs, because it was not a decision upon the "cause." By 30 & 31 Vict. c. 142, s. 13, an appeal is given with the leave of the judge in actions in which it had not previously been allowed. This at the utmost would give an appeal from an interlocutory order with leave of the judge, but even then the order must have been made in the original action, and a garnishee order is a separate proceeding between the plaintiff and a third party.

Marshall, in support of the rule. There is no express authority for the proposition that an appeal does not lie from a garnishee order in a county court. The garnishee becomes a party to the original action. Whatever may have been decided in *Carr* v. *Stringer* (1), appeals from interlocutory orders in the county courts have since been entertained: *Hares* v. *Lea.* (2) [He also referred to *Cotterell* v. *Stratton.* (3)]

COCKBURN, C.J. I think that there is no appeal from the garnishee order made by the county court judge, and that this rule must be discharged. I am disposed to regret the construction placed by the Court upon the words "either party in any cause" in *Beswick* v. *Boffey* (4), where it was held that they must be taken to mean the original party in the action. I think that a liberal interpretation ought to be put upon the words giving a right of appeal, and it might well be said that an order made incidentally to an action is made in the action. But we are bound by *Beswick* v. *Boffey* (4) and the cases following it, for I think they cannot be distinguished from the present case, and that they shew that the right of appeal does not extend to an order between the plaintiff and a third party who is brought into the proceedings.

MELLOR, J. I am of the same opinion. I can see no difference on principle between this order and those where there has been held to be no right to appeal. The Act 30 & 31 Vict. c. 142, s. 13, does extend the right to appeal, for it only gives an appeal

(1) E. B. & E. 123.
(2) Law Rep. 10 Eq. 683.
(3) Law Rep. 8 Ch. 295.
(4) 9 Ex. 315; 23 L. J. (Ex.) 89.

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from the decision in "an action," without adding the words "or matter," or otherwise making provision for an appeal in orders like the present.

Rule discharged without costs.

Solicitors for plaintiff: *Walker, Son, & Field, for Peacock, Cooper, & Gregory, Liverpool.*

Solicitors for defendant: *Cunliffe, Beaumont, & Davenport, for Churton, Liverpool.*

1879
July 3.

ADAMSON AND ANOTHER *v.* THE NEWCASTLE STEAM-SHIP FREIGHT INSURANCE ASSOCIATION.

Insurance (Marine)—Chartered Freight—Restraint of Princes—Charterparty void or voidable in event of War.

7 QBD 76

The plaintiffs chartered the ship *Edgar* to C. by charterparty in which it was agreed that the ship after completing intermediate employment (which she was to be at liberty to take) should proceed to Galatz for orders to load there, &c., and being so loaded proceed to Malta for orders. Upon the margin of the charterparty were the words, "In the event of war, blockade, or prohibition of export preventing loading, this charterparty to be cancelled." The plaintiffs then effected a policy with the defendants for the insurance of the freight of the ship against perils of the seas, restraint of princes, &c. The *Edgar* sailed for Genoa under the charterparty on the 1st of May, 1877, war having been declared by Russia against Turkey on the 24th of April. Before her arrival at Genoa, the plaintiffs ascertained that Russia had closed the ports of loading mentioned in the charterparty. The *Edgar*, however, discharged her cargo and took in ballast at Genoa and sailed for Constantinople, and upon her arrival there on the 28th of May, found that the loading ports were closed, and that there was no reasonable probability of their being open in time for her to load her chartered cargo. She therefore did not proceed further towards Galatz, but obtained a homeward cargo at a freight less than that stipulated for by the charterparty. In an action upon the policy:—

Held, by the majority of the Court (Cockburn, C.J., and Manisty, J., Lush, J., dissenting) that the plaintiffs could not recover, for according to the true construction of the charterparty the act of closing the ports by the Russian government was a prohibition of export preventing loading, and that upon the happening of that event the charterparty came to an end—without any election by either party.

By Lush, J., dissenting, that the effect of the memorandum in the margin was to make the charterparty voidable only at the option of either party, that neither party having elected to avoid it the charterparty continued in force up to the time when the loading became impracticable, and that the plaintiffs had sustained such a loss of the chartered freight as to entitle them to recover.

SPECIAL CASE stated by an arbitrator under a submission, no action having been brought.

The facts and arguments sufficiently appear in the judgment of Manisty, J.

June 18, 20. *Benjamin, Q.C.*, and *J. P. Aspinall* (*Cohen, Q.C.*, with them), for the plaintiffs, referred to *Geipel* v. *Smith* (1), and *Barber* v. *Fleming*. (2)

Wood Hill (*Sir H. Giffard, S.G.*, with him), for the defendants.

Cur. adv. vult.

July 3. The following judgments were delivered.

MANISTY, J. This was a claim on a policy of insurance on the freight of the ship *Edgar*, effected by the plaintiffs with the defendants on the 24th of February, 1877, from noon of the 20th of February, 1877, until noon of the 20th of February, 1878, at all times and in all places. The perils insured against were, among others, perils of the seas, and restraints and detainments of kings and princes, and the interest insured was "owner's freight at risk on board the ship or chartered when in ballast."

By a charterparty dated prior to the policy of insurance, namely, on the 17th of February, 1877, the plaintiffs chartered the *Edgar* to one J. A. Cicognani, by which it was agreed that the ship after completing intermediate employment (which she was to be at liberty to take) should proceed to Galatz for orders to load there, or at Braila or Ismalia, and there load a full and complete cargo of grain or seed, and being so loaded should therewith proceed to Malta for orders, &c., and by a memorandum in the margin of the charterparty it was agreed as follows: "In the event of war, blockade, or prohibition of export preventing loading this charterparty to be cancelled."

On the 24th of April, 1877, Russia declared war against Turkey, and on the 30th of April, her Majesty issued a proclamation of neutrality.

On the 1st of May, 1877, the *Edgar* sailed from the Tyne for Genoa with a cargo of coal, under a charterparty. She arrived at Genoa on the 14th of May, 1877, and after discharging that cargo she took in ballast for the purpose of proceeding to Galatz.

Before the *Edgar* arrived at Genoa the plaintiffs ascertained

(1) Law Rep. 7 Q. B. 404. (2) Law Rep. 5 Q. B. 59.

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that Russia had closed the ports of loading mentioned in the charterparty of the 17th of February, 1877. Nevertheless the *Edgar* by order of the plaintiffs sailed from Genoa in ballast on the 21st of May, 1877, towards Constantinople to fulfil the charterparty of the 17th of February. Before doing so the plaintiffs requested the charterer (Cicognani) to cancel the charterparty, but he refused to do so, and insisted upon holding the plaintiffs to it.

The *Edgar* arrived at Constantinople on the 28th of May, when it was found that the loading ports were still closed, and that there was no reasonable probability of their being open in time for the *Edgar* to load the chartered cargo, she therefore did not proceed farther towards Galatz, but obtained at Constantinople a homeward cargo for England, the freight of which was less than the freight she would have earned had she obtained the chartered cargo.

This action is brought to recover the difference, and the questions submitted to us are, first, whether "the charterparty became as a matter of law void" (by which I understand the parties to mean whether according to the true construction of the charterparty it came to an end), "on the closing of the ports of loading in the charterparty mentioned without any election to cancel it having been made either by the shipowner or the charterer;" secondly, whether "the charterparty was as a matter of law void, and rescinded before the *Edgar* sailed in ballast from Genoa."

I am of opinion that both questions should be answered in the affirmative. I think that the act of closing the ports by the Russian Government was a "prohibition of export preventing loading," within the meaning of the memorandum in the margin of the charterparty, and that upon the happening of that event (which was before the *Edgar* reached Genoa), the charterparty came to an end—without any election by either party.

It is contended on the part of the plaintiffs that the charterparty was voidable only at the option of either party, that neither party having elected to avoid it the charterparty continued in force, and that consequently the *Edgar* having sailed from Genoa for Galatz in ballast, there was a loss of chartered freight when the ship was in ballast.

This construction necessitates the introduction into the charterparty of the words "at the option of either party," after the words "to be cancelled," which would not only violate the rule of construction that words should never be added, unless it be absolutely necessary to add them in order to give effect to the plain and manifest intention of the parties; but it would, as it seems to me, defeat the plainly expressed intention of the parties, and might give rise to questions of considerable difficulty. One such question would be when was the option to be exercised? I suppose each party would be allowed a reasonable time for making up his mind whether he would or would not abandon the adventure.

The authorities seem to shew that, in the event of a restraint of princes, the obligation of a shipowner (in the absence of any special provision) is to wait a reasonable time for the purpose of ascertaining whether the restraint is likely to be of such a duration as to render it impossible, commercially, to carry out "the contract," and the question of what is a reasonable time must depend upon the circumstances of each particular case.

It was suggested in the course of the argument for the plaintiffs that under the circumstances of the present case the master was justified in sailing from Genoa, and proceeding as far as Constantinople before abandoning the adventure, and that consequently the chartered voyage had commenced, and the policy had attached, whereas on the part of the defendants it was contended that, in the absence of the clause in question, the duty of the master would have been to wait a reasonable time at Genoa for the purpose of ascertaining if the prohibition was likely to be removed, and that if he had done so the chartered voyage never would have been commenced.

The plaintiffs' construction of the charterparty would involve this question. The defendants' construction excludes it.

Other questions of more or less difficulty and nicety would be open as between the shipowner and the charterer if the plaintiffs' construction of the charterparty be adopted, all of which are excluded by the defendants' construction of it.

If the parties really intended that the charterparty should only be voidable at the option of either of them, it was very easy for them to say so, and it is worthy of note that when they did so

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mean they did so say. The charterparty included two ships. As to one of them it was stipulated that if it did not arrive at the loading port on or before the 15th of June, the charterers were to have the power to cancel the charter. As to the other it was stipulated that if it did not arrive at the port of loading by the 30th of June "charter for that steamer to be cancelled." If the words "to be cancelled" in the memorandum as to the prohibition of export are to be read as meaning "to be cancelled at the option of either party," the same words in the stipulation to which I have just adverted would, I suppose, have to be read in like manner, and I cannot for a moment believe that such was the intention of the parties.

Of course it was open to the parties to agree that the second ship should be loaded notwithstanding she did not arrive at the port of loading by the 30th of June, but that would have been matter of new agreement. So the parties might have agreed at Genoa that, notwithstanding the prohibition of export from the ports of loading, the *Edgar* should proceed to Constantinople or to Galatz, or anywhere else, but that would have been a new agreement, dehors the charterparty.

I think it much safer to adhere to the words which the parties have used, and to give effect to them according to their plain and ordinary signification than to put a construction upon them which necessitates the introduction of additional words.

For these reasons I am of opinion that the questions put to us should be answered in the affirmative.

COCKBURN, C.J. I concur in this judgment. On the first argument I was disposed to think that the effect of the memorandum was to make the charter not void, but voidable at the option of either party, so that if both parties concurred in waiving the right to cancel, the charter would continue in force. But, on fuller consideration, I have arrived at the opposite conclusion, and am of opinion that the meaning and effect of the memorandum was—in order to prevent all further question or delay—to put an end ipso facto to the charterparty on the happening of the contingency.

LUSH, J. I regret that I am unable to concur with the Lord

Chief Justice, and my Brother Manisty, as to the construction to be put upon the memorandum to the charterparty. If there had been but one contingency provided for, and that one was "prohibition of export preventing loading," there would have been no difficulty, and it would have been immaterial whether the words "to be cancelled" were read as importing "shall be cancelled," or only "may be cancelled," in other words, whether on the happening of the event the charterparty was to be treated as absolutely void, or only voidable. But two other contingencies are mentioned, namely, "the event of war," and "blockade." A declaration of war may long precede a blockade or a closing of the ports; the seat of hostilities may be far off, or hostilities may terminate before reaching such a stage. The meaning put upon the words in their application to one of the specified events, must be put upon them in their application to each event.

The charter must of course be construed without reference to the policy of insurance, and as if the contention arose between the charterer and the shipowner. Suppose the shipowner in this case, instead of stopping at Constantinople had gone on to one of the loading ports, with the intention of carrying out the charter, and had, when he arrived there, found that the prohibition had been, or was shortly to be, withdrawn; but that he could command higher freights on a homeward voyage, was he to be at liberty then to change his mind and to fall back upon the declaration of war which took place, and which he knew of before he started from Genoa? If the memorandum means that upon that event the charter is to be treated as actually cancelled, he may, and it would be a good defence to an action by the charterer for refusing to receive the cargo, that the charter had ceased to be in force. Or supposing the charterer found, when the ship arrived at the port, that he could ship at a lower rate than the chartered freight, he might set up the same plea as an excuse for not shipping the cargo. I cannot think that the parties intended to place themselves in this position. Nor do I think that a verbal agreement by the two, not to treat it as cancelled, would have any binding force. By the hypothesis the charter is void, and nothing short of a written agreement would have the effect of reviving it, which would be to make a new charter. The word charter imports a

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writing. A verbal charter is a thing unknown in maritime commerce. There may be an agreement on the one hand to load and on the other to carry, but the security and the special provisions and exceptions always found in a charter would be wanting.

The alternative construction would answer every purpose intended by the parties, and be free from inconvenience. If it is voidable only the charter would remain in force until one of the parties elected to avoid it, but it would be optional to either of them to put an end to it upon the happening of either of the specified events, provided he did so within a reasonable time, and before the other party had altered his position upon the faith of his having waived it. If, for example, after the vessel had arrived at Constantinople, the master had found that the ports were open, it would be too late, after what occurred at Genoa, for him to quote the declaration of war as a ground of declaring the charter at an end. It is objected that this construction requires the memorandum to be enlarged by adding the words "at the option of either of the parties." But that seems to me necessarily implied. The memorandum is the language of both parties, and amounts to an agreement that, in certain events the charter may be cancelled. It cannot mean that if both concur they may cancel it. That they can do at any time without any previous agreement. The words read in that sense would have no effect. They must, as it seems to me, to give them any operation at all, mean that either may cancel. Express words are found in another part of the charter, but that is where an option is given to one party only. Nor do I think that writing or any other manual act is necessary in order to cancel. It is sufficient that the party elects to exercise his option, and notifies his election to the other party.

A further objection is that this construction makes the memorandum useless. But its purpose will appear if we consider what the rights and obligations of the parties would have been without it. Supposing, for example, the master had reached the loading port, and had there received information that it was likely to be soon opened, he would have to stay there a reasonable time to see if that event happened. If he went away, and the prohibition were taken off a few days afterwards, the charterer might say he

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had not waited long enough. The charterer might be in the same dilemma if the shipowner wished to stay, and he wanted to dispose of his goods on shore. The object of the memorandum was to avoid these harassing questions, and to enable each party as soon as the event happened, which might defeat the voyage, to put an end to it and to all possible litigation upon such a question.

For these reasons I am of opinion that the charter continued in force up to the time when the loading became impracticable, and consequently that the assured had an interest in the chartered freight which he lost by the "restraint of princes."

Judgment for the defendants.

Solicitor for plaintiffs: *H. C. Coote, for H. Adamson, North Shields.*

Solicitors for defendants: *Williamson, Hill, & Co., for Ingledew & Daggett, Newcastle-upon-Tyne.*

THE QUEEN *v.* THE JUSTICES OF BERKSHIRE.

1878
May 23.

Licensing Act, 1872 (35 & 36 *Vict. c.*, 94), *s.* 52—*Appeal to Sessions—Recognizance to be entered into "immediately"—Mandamus.*

By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 52, any person aggrieved by any order or conviction made by a court of summary jurisdiction may appeal therefrom, subject to the conditions and regulations following:—

(2) The appellant shall within seven days after the cause of appeal has arisen, give notice to the other party and to the court of summary jurisdiction of his intention to appeal and of the ground thereof.

(3) The appellant immediately after such notice shall enter into a recognizance before a justice with two sureties, conditioned personally to bring such appeal, &c.

At the hearing of an appeal under the above section it appeared that notice of appeal was given on Monday, March 10th, and that the recognizance was entered into on Friday, March 14th. The sessions, no explanation of the delay being offered, dismissed the appeal:—

Held, upon application for a mandamus for the sessions to hear the appeal, that affidavits accounting for the delay ought not to be considered, and that the sessions upon the evidence before them were warranted in finding that the recognizance had not been entered into 'immediately' after the notice.

RULE calling on the justices of Berkshire to shew cause why a mandamus should not issue commanding them to enter continu-

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THE QUEEN v. JUSTICES OF BERKSHIRE.

ances and hear an appeal by G. Tuck, against a conviction under 35 & 36 Vict. c. 94, s. 17, sub-s. 2. (1)

It appeared upon affidavits that, on the 4th of March, 1879, the appellant was convicted by a justice under the above statute for unlawfully suffering gaming to be carried on on his licensed premises. The requisite notices of appeal were served on Monday, the 10th of March, but the recognizance was not entered into until Friday, the 14th of March. At the hearing of the appeal, on the 8th of April, objection was taken that the recognizance was not entered into within the prescribed time, and no explanation of the delay being afforded, the sessions declined to hear the appeal.

The affidavits in support of the application for the mandamus stated facts with the view of shewing that the delay in entering into the recognizance and the absence of any explanation at the sessions were unavoidable.

H. D. Greene, shewed cause. The sessions were justified upon the evidence before them in holding that the recognizance had not been entered into "immediately" after the notice as required by the Act. It is established by various decisions that the word "immediately" must be construed as "promptly and expeditiously under all the circumstances of the case": *Reg.* v. *Worcester* (2); *Toms* v. *Wilson* (3); *Forsdike* v. *Stone* (4); *Reg.* v. *Aston.* (5) The

(1) By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 17: If any licensed person suffers any gaming, or any unlawful game, to be carried on on his premises,—he shall be liable to a penalty not exceeding for the first offence 10*l.*

By s. 52: If any person feels aggrieved by any order or conviction made by a court of summary jurisdiction, the person so aggrieved may appeal therefrom, subject to the conditions and regulations following:—

2. The appellant shall within seven days after the cause of appeal has arisen give notice to the other party, and to the court of summary jurisdiction, of his intention to appeal, and of the ground thereof.

3. The appellant immediately upon such notice shall enter into a recognizance before a justice of the peace with two sufficient sureties conditioned personally to try such appeal, and to abide the judgment of the Court thereon to pay such costs as may be awarded by the Court, or shall give such other security by deposit of money or otherwise as the justice may allow.

(2) 7 Dowl. 789.

(3) 4 B. & S. 455; 32 L. J. (Q.B.) 382.

(4) Law Rep. 3 C.P. 607.

(5) 19 L. J. (M.C.) 236.

Court will only consider the evidence before the sessions, and this shewed that more than a reasonable time for perfecting the recognizance had elapsed.

A. T. Lawrence, in support of the rule. Adopting the suggested definition of the word "immediately," four days was not an unreasonable time for entering into the recognizance. In the result the respondent for twenty-five days before the hearing knew that a perfected appeal was pending. The decision of the sessions was not conclusive, for it was upon a mixed question of fact and law: *Ex parte Blues* (1); *Reg.* v. *Essex* (2); *Reg.* v. *J. J. Kesteven.* (3)

COCKBURN, C.J. I think this rule must be discharged. The question is whether the sessions were right in holding that the regulation in 35 & 36 Vict. c. 94, s. 52, sub-s. 3, as to entering into a recognizance "immediately" after notice of appeal, had been complied with? The notice was given in due time, but the appellant did not enter into the recognizance until four days afterwards. Did this satisfy the words of the statute? The question is substantially one of fact. It is impossible to lay down any hard and fast rule as to what is the meaning of the word "immediately" in all cases. The words "forthwith" and "immediately" have the same meaning. They are stronger than the expression "within a reasonable time," and imply prompt, vigorous action, without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case. Who is to decide the question? Undoubtedly the sessions, and unless we can clearly see that they have gone wrong and put some construction on the word "immediately" which it will not bear, their decision must prevail. The appellant seeks to bring before the Court materials which did not come before the sessions. I think we have no different power to receive evidence on the point before the Court than in the case of an ordinary appeal from the sessions; and this being the case, we ought not in the exercise of our discretion to review upon fresh facts the decision of the justices.

(1) 5 E. & B. 291; 24 L. J. (M.C.) 138.

(2) 34 L. J. (M.C.) 41.

(3) 3 Q. B. 810.

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MELLOR, J., concurred.

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MANISTY, J. I am of the same opinion. The object of the legislature, in requiring the recognizance to be entered into immediately after the notice of appeal, was not merely to ensure that the appeal was bonâ fide, but inasmuch as under the regulations the respondent might be left with no more than seven days in which to get up his case, that he should be put to no delay. If the law were that the appellant was at liberty to postpone entering into the recognizance for four days, and at the end of that time to abandon his appeal, the respondent would be embarrassed as to how soon he could prepare for the hearing so as to secure his costs.

Rule discharged.

Solicitor for prosecution: *C. Mallam, for T. & G. Mallam, Oxford.*

Solicitors for respondents: *J. Crowdy & Son.*

1879
July 3.

DE OLEAGA & CO. *v.* WEST CUMBERLAND IRON AND STEEL COMPANY.

Sale of Goods—Delivery by Monthly Instalments—Clauses entitling Seller to Suspend, or excusing him from making Deliveries—Right to Rescind—Duration of Contract.

By agreement between the plaintiffs and the defendants, the plaintiffs, who were merchants at Bilbao, undertook to supply the defendants at Workington, Cumberland, with about 30,000 tons of Sommorostro ore at the price of 25*s.* 6*d.* per ton, cost freight and insurance, payment to be made by cash on delivery of each shipment, "Deliveries to be made at the rate of from 800 to 1300 tons per month, provided we (plaintiffs) are able to procure tonnage at or under the rate of 16*s.* 6*d.* per ton. No responsibility to attach to us should we be prevented from delivering all or any portion of the ore, through any dangers and accidents of the mines, railway shoots, rivers, seas, and navigation of whatever nature or kind, or through any circumstances beyond our own control:"—

Held, first, that the plaintiffs were entitled to deliver quantities of the ore which they had previously withheld while freights were above the limit, provided such deliveries were made within a reasonable time, having regard to the contemplated duration of the contract, the means which they had to make up

arrears, &c.; secondly, that they were not entitled to deliver quantities which they had previously been prevented from delivering from dangers and accidents of the mines, &c., such quantities being as much struck out of the contract as if they had been actually delivered.

SPECIAL CASE.

The facts and arguments sufficiently appear in the judgment.

June 20 and 24. *C. Russell, Q.C.*, and *Warr*, for the plaintiffs. *Herschell, Q.C.*, *Bompas, Q.C.*, and *Crompton*, for the defendants.

Cur. adv. vult.

July 3. The judgment of the Court (Cockburn, C.J., Lush, and Manisty, JJ.) was delivered by

LUSH, J. This is an action on a contract contained in an offer of the 12th of February, and an acceptance of the 15th of February, 1872, by which the plaintiffs, who are merchants at Bilbao, and also at Liverpool, undertook to supply the defendants at Workington, Cumberland, with about 30,000 tons of Sommorostro ore, at the price of 25*s.* 6*d.* per ton of 20 cwt., cost, freight, and insurance.

Payment to be made by cash on delivery of each shipment.

The portions of the contract material to the case are the following:—

"Deliveries to be made at the rate of from 800 to 1300 tons per month, provided we are able to procure tonnage at or under the rate of 16*s.* 6*d.* per ton.

"No responsibility to attach to us should we be prevented from delivering all or any portion of the ore through any dangers and accidents of the mines, railway shoots, river, seas, and navigation of whatever nature or kind, or through any circumstances beyond our own control."

The mines from which the ore is obtained are near Bilbao, which was the port of shipment contemplated by the parties.

If the 30,000 tons had been delivered regularly at the minimum rate of 800 tons a month, the contract would have been completed in December, 1874; if at the rate of 1050 tons a month (the

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mean between 800 and 1300), the contract would have run out in July, 1874.

For the first ten months after the contract, the plaintiffs had the opportunity of procuring freight under 16*s.* 6*d.* per ton for the minimum quantity, but they failed to do so. In the summer of 1872, freights rose above the limit. In October, 1872, and again in April, 1873, a cargo of other ore was delivered and accepted in substitution of Sommorostro ore. With these exceptions, nothing had been done in performance of the contract up to April, 1873. At that time, in consequence of the continued high freights, an agreement was come to at the instance of the plaintiffs by which the contract price was raised to 28*s.* ex sailing vessels, and 29*s.* 6*d.* ex steamers, provided freight could be obtained at certain other specified rates.

In May, 1873, 390 tons were delivered under the modified contract; in June, 303½ tons, and 501 tons 15 cwt. of other ore, which was accepted as delivered under the contract; and in July, 1873, 269 tons 14 cwt. more, making altogether 1946 tons. Between May and July, 1873, inclusive, there was nothing in the rate of freight to excuse the regular delivery.

From July, 1873, down to February, 1876, the plaintiffs were prevented by warlike operations around Bilbao and the mines from making delivery of any part of the ore. On the 29th of February, 1876, by which time these troubles had ceased, the plaintiffs gave notice that the mineral trade at Bilbao had re-opened, and they should proceed to deliver the ore according to the contract. The defendants refused to accept, on the ground that the contract no longer existed.

Upon these facts the following questions are submitted to us:—

1. Are the monthly quantities, the delivery of which, at the time they would in ordinary course have been due, was prevented or excused by the provisions of the contract, to be treated as quantities expunged from the contract, or as quantities the delivery of which was postponed?

2. Was the contract in force in February, 1876, or had it run out in July, 1874, or December, 1874?

There is we think a material distinction between the delivery clause and the clause by which the seller exempts himself from

responsibility. The object of the one is simply to regulate the mode of performance, which is to be by monthly instalments, subject however to interruptions contingent on the rate of freight. So long as freight ranged above the limit the seller was entitled to withhold delivery, but the contract for the quantity undelivered remained in force. The delivery was merely suspended until freights came down. If no other stipulations had been found in the contract the seller would in that event have been both entitled and bound to resume the monthly deliveries, and if he failed to do so the buyer would have been entitled to buy in against him and sue for the difference between the contract price and the then market price. And it would have been no answer to such an action to say that he was prevented from making delivery by accident to the mines, or railway shoots, river, or navigation, or any other circumstances beyond his control.

It is clear that in such a case the seller could not afterwards claim to deliver, nor the buyer claim to have, the quantities in respect of which the one had made default, and the other had had, or was entitled to have a substitute in damages. Those portions could be as much struck out of the contract as if they had been actually delivered.

The object of the clause secondly before quoted is to protect the seller from such liability, and nothing more, leaving the rights of the parties in other respects as they would have been if no such clause existed. The non-delivery, under such circumstances, is not a suspension of performance; it is a breach, but one for which the buyer agrees he will not hold the seller responsible.

The result is that the seller was entitled to deliver the quantities which he withheld while freights were above the limit, but not those which he was prevented from delivering by vis major.

But then arises the question, within what time must he deliver the quantities so withheld? Some limit must necessarily be put, and the only limit which occurs to us is a reasonable time, having regard to the contemplated duration of the contract, &c. It cannot be contended that such a contract remains open as long as the seller finds it to his interest to remain passive, with power to enforce it at any distance of time. The reasonable limit is to be determined as a question of fact, in view of the contemplated

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duration of the contract, the means which the seller had to make up the arrears, and possibly other circumstances. If that period expired during the time the shipments were prevented by the civil war, the arrears must be treated like the accruing monthly deliveries, as struck out of the contract. We cannot say, as a matter of law, that the contract was out in July, 1874, or in December, 1874. All that we can answer is, that it ran out at the expiration of what would have been a reasonable time if the seller had not been prevented from shipping by vis major.

The case of *King* v. *Parker* (1) we cannot regard as a satisfactory decision upon this point. The main point raised and argued was whether the strike itself put an end to the contract. The Court held that it did not; and from that opinion, looking to the terms of the contract, we see no reason to dissent. The question whether it was too late, having regard to all the circumstances, for the seller to insist on delivery, was certainly raised, but does not appear to have been pressed, and the Lord Chief Baron gives no opinion upon the point.

A third question is submitted to us, to which we answer that in our opinion the plaintiffs were not bound, under the circumstances stated, to ship at any other port than Bilbao.

Solicitors for plaintiffs: *Field, Roscoe, & Co.*

Solicitors for defendants: *Bischoff, Bompas, Bischoff, & Co., for E. & E. L. Waugh, Cockermouth.*

(1) 34 L. T. 887.

THE QUEEN *v.* SIR CHARLES REED.

1879
June 27.

Elementary Education Act, 1873 (36 & 37 *Vict. c.* 86), *s.* 10—*Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *ss.* 53, 54—*School Board—Borrowing Powers—Temporary Loan for Current Expenses.*

A school board have power, when the school fund proves insufficient, to contract a temporary loan for the purpose of meeting their current expenses until they can obtain money out of the rates.

Ruled by C. A. affd. 5 Q B D. 483.

A RULE NISI had been granted for a writ of certiorari to bring up the disallowance and surcharge by the auditor of the Metropolitan District of a sum of 83*l.* 11*s.* 2*d.* in the accounts of the London School Board. The reasons stated by the auditor for the disallowance were as follows:—

In the account for the half-year ended at Lady Day, 1879, of the London School Board I disallowed the sum of 83*l.* 11*s.* 2*d.* entered in the said account as and for a charge upon or payment out of the school fund of the said school board for interest to the governors and directors of the Bank of England, the treasurers of the school board, upon sums of money advanced as temporary loans by the said governors and directors of the Bank of England to the school board. I made such disallowance for the following reasons:—

1. Because such sums of money were not borrowed with the consent of the Education Department.

2. Because such sums of money were not borrowed or advanced in compliance with the requirements of, and with the consent required by, 36 & 37 Vict. c. 86, s. 10.

3. Because the said temporary loans were either wholly or partially applied and used for the general or current expenditure of the board, for which purpose school boards are not authorized to borrow money.

4. Because the school board had not obtained, under the provisions of ss. 53, 54 of 33 & 34 Vict. c. 75, adequate sums to meet the deficiency of the school fund, and they have consequently used or employed moneys raised by temporary and other loans to repay the expenses of the school board.

5. Because the school board had not authority in law to borrow

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or obtain such loans, and to pay or charge in their accounts any amount for interest upon such loans.

6. Because the statutes 33 & 34 Vict. c. 75, and 36 & 37 Vict. c. 86, have provided means whereby school boards may supply themselves with the necessary funds for carrying out the duties entrusted to school boards, and the sums of money so borrowed have not been raised in compliance with the provisions, and the said interest is not such interest as school boards may charge upon the school fund of the district by virtue of s. 10 of 36 & 37 Vict. c. 86.

The auditor surcharged Sir Charles Reed, who, as the chairman of the board, had authorized the illegal payment.

McIntyre, Q.C., and *Glen*, on behalf of the auditor, shewed cause. The school board, being a statutory body existing only for the purposes of the statutes by which they were created, have no powers of borrowing except those given them by the statutes. The loans in the present case were not contracted under the provisions of the Elementary Education Acts relating to borrowing.

[LUSH, J. Those provisions relate to borrowing for long periods, and when the rates are to be mortgaged. This is the case of a temporary loan to meet a temporary deficiency. Is it not inevitable that a need for such loans must occasionally arise?]

The principle which has been so often applied in the case of the poor rate applies here. The board are bound to provide prospectively for current expenditure: *Tawney's Case* (1); *Rex* v. *Wavell.* (2)

[LUSH, J. The current expenditure, by 33 & 34 Vict. c. 75, s. 53, is to be provided for out of the school fund. But the school fund is a fund the amount of which may not be certain, for it includes the moneys received as fees from scholars, which may vary from time to time. It is possible that in estimating for their expenditure prospectively, the school board may make a miscalculation, or some unforeseen contingency may arise. What is to happen if they fall short of funds? May they not borrow temporarily in the interval that must elapse before they can raise funds by means of a precept?]

(1) 2 Ld. Raym. 1009. (2) 1 Doug. 115.

The school board ought to allow sufficient margin in their prospective estimate to cover all contingencies.

[COCKBURN, C.J. The effect of your contention is that they must raise an amount greater than that which they probably will require, and so throw an unnecessary burden on the ratepayers for the time being. The 53rd section seems by implication to give a power of borrowing for temporary purposes, because it says that the school fund shall consist, inter alia, of moneys raised by way of loan.]

It is submitted that those words refer to the moneys borrowed for special purposes under the section giving power to borrow for such purposes; but the moneys so borrowed, though forming part of the school fund, are not applicable to current expenditure. The school board have only the powers given them by the Elementary Education Acts, and, inasmuch as those statutes contain special provisions as to borrowing, no other power to borrow can be implied.

Sir H. James, Q.C., and *Jeune*, in support of the rule, were not called upon.

BY THE COURT (Cockburn, C.J., Lush and Manisty, JJ.). The rule must be absolute.

Rule absolute.

Solicitors for school board: *Gedge, Kirby, & Millett.*
Solicitors for auditor: *Frankish & Buchanan.*

1879
March 5.

[IN THE COURT OF APPEAL.]

ADAMS *v.* HAGGER.

Building Contract—Landlord and Tenant—Agreement to grant Lease—Collateral Contract—Contract to pay Rent for Land intended to be demised until Execution of Lease—8 & 9 *Vict. c.* 106, *s.* 3.

By articles of agreement not under seal the plaintiff agreed to grant to the defendant a lease at a certain rent for ninety-nine years of a piece of land so soon as the latter should have erected upon it a messuage, and the defendant undertook until the execution of the lease to "hold the said piece of land and other the premises at the rent and subject to the conditions to be contained" in the lease. The defendant never entered upon or took possession of the piece of land:—

Held, that although the articles of agreement did not operate as a demise, yet the defendant by a collateral contract to the intended lease had undertaken to pay the amount of the rent, and that it was immaterial that he had never entered upon possession of the land.

ACTION to recover 51*l.* claimed as ground rent for four years and a quarter from the 25th of March, 1874, to the 24th of June, 1878.

At the trial before Mellor, J., and a jury, during the Hilary Sittings, 1879, the following facts were proved:—

By articles of agreement, not under seal, and made on the 8th of June, 1874, between the plaintiff, thereinafter called the lessor, of the one part, and the defendant, thereinafter called the lessee, of the other part, it was agreed that "when and so soon as the messuage or dwelling-house and shop hereinafter agreed to be erected and built shall be completely finished and made fit for habitation, occupation, and use, to the satisfaction of the surveyor for the time being of the lessor, and such surveyor shall have granted his certificate in writing to that effect, the lessor will demise to the lessee" a certain piece of land therein described, "and the messuage or dwelling-house and shop to be erected thereon, with the appurtenances, for the term of ninety-nine years computed from the 25th day of December, 1873, under the rent of one peppercorn for the first quarter of a year of the said term, and the rent of 12*l.* per annum for the remainder of the same term," payable quarterly, "the first of such quarterly payments to be made on the 24th day of June, 1874." The articles specified

the lessee's covenants to be contained in the lease, and provided that the lessee on or before the 25th of March, 1876, should finish the dwelling-house or shop intended to be erected. The articles then contained the following clause: "The lessee will in the meantime, and until the said lease hereby agreed to be granted shall be actually executed, hold the said piece of land and other the premises at the rent and subject to the conditions to be contained in the said lease as aforesaid." Power was reserved to the lessor to re-enter upon and take possession of the piece of land and to retain it as his own absolute property if the lessee did not proceed with the works with proper diligence, and the lessee bound himself to accept a lease upon the terms above-mentioned.

The defendant never entered upon the possession of the piece of land, nor erected the intended dwelling-house and shop, nor did he make any payments to the plaintiff. No lease was ever executed by the plaintiff to the defendant. The writ in the present action was issued upon the 19th of July, 1878.

Mellor, J., was of opinion that upon these facts the jury might find that the articles of agreement had been broken by the defendant; and the jury having found in the plaintiff's favour, judgment was directed to be entered for him for 51*l.*

The defendant applied to the Queen's Bench Division for an order nisi for a new trial on the ground of misdirection, but the order was refused.

The defendant appealed to this Court for an order nisi.

W. H. Clay, for the defendant. By the articles of agreement the defendant before the execution of the lease was to "hold" the piece of land at the specified rent; the parties therefore marked out the event, upon which the liability of the defendant was to arise; and that event has not happened; for the defendant has never entered upon possession of the piece of land, nor has he ever become tenant of it to the plaintiff; he has therefore never "held" it within the meaning of the agreement. The present case is distinguishable from *Marquis of Camden* v. *Batterbury* (1); in that case there was an absolute covenant to pay the agreed sums until the lease should be executed.

(1) 5 C. B. (N.S.) 808; 28 L. J. (C.P.) 187; in Ex. Ch. 7 C. B. (N.S.) 864; 28 L. J. (C.P.) 335.

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[BRETT, L.J. The defendant has to meet the argument that the holding of the piece of land is not a condition precedent to his liability to pay the agreed sums.]

Without entry and possession the defendant would be liable to pay the ground-rent only if the articles of agreement operated as a demise; but it is clear that they cannot be construed as a lease: *Drury* v. *Macnamara* (1): no tenancy was created; and even if they could otherwise operate as a lease, they not being under seal would be void. To hold the defendant liable would in effect repeal the provision in 8 & 9 Vict. c. 106, s. 3, which requires leases for more than three years to be by deed.

BRETT, L.J. It seems to me that the defendant is liable to pay the amount claimed in this action. The material clause in the articles of agreement is that by which the lessee until the execution of the lease is to "hold the said piece of land and other the premises at the rent and subject to the conditions to be contained" in the intended lease. I think that this is an absolute undertaking by the defendant to pay the agreed amounts, and that it is immaterial that he has not entered upon and taken possession of the land. The clause in truth contains a contract, which is independent of and collateral to the intended lease. The clause which I have mentioned is not identical in its terms with that in *Marquis of Camden* v. *Batterbury* (2), but the two clauses are substantially the same, and that case when it has been carefully looked at, is a strong authority for the view which we take; for the defendant was held not to be liable upon the ground, that the original contractor (who occupied the same position as the present defendant), was the person, to whom the plaintiff must look for the payment of the sums claimed. The clause sued upon is a very common stipulation inserted in building contracts for the protection of the owner of the soil. The motion for an order nisi for a new trial must be refused.

COTTON, L.J. I am of the same opinion. It may be assumed that the articles of agreement do not operate as a lease; but the

(1) 5 E. & B. 612; 25 L. J. (Q.B.) 5.
(2) 5 C. B. (N.S.) 808; 28 L. J. (C.P.) 187; in Ex. Ch. 7 C. B. (N.S.) 864; 28 L. J. (C.P.) 335.

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question is whether the clause as to payment of the agreed sums before the execution of the lease is binding upon the defendant, although he has not entered upon possession of the piece of land. I think that he is bound by it.

THESIGER, L.J. I am of the same opinion. The defendant is bound to pay the sums claimed by force of the collateral contract into which he has entered.

Order refused.

Solicitors for defendant: *G. J. & P. Vanderpump.*

[IN THE COURT OF APPEAL.]

June 11.

Re THE MUSICAL COMPOSITIONS "KATHLEEN MAVOURNEEN" AND "DERMOT ASTORE."

Ex parte HUTCHINS AND ROMER.

Copyright in Music—Exclusive Right of Performance—Musical Composition published before 5 & 6 Vict. c. 45—Assignment by Deed of Copyright together with all "property" and "benefit"—5 & 6 Vict. c. 45, ss. 2, 4, 14, 20, 22—3 & 4 Wm. 4, c. 15.

The Act, 5 & 6 Vict. c. 45 (which by s. 20 incorporates 3 & 4 Wm. 4, c. 15, and extends its provisions to musical compositions), confers an exclusive right to the performance of musical compositions published within ten years before the passing of the Act.

Decision of the Queen's Bench Division, ante, p. 90, overruled.

Within ten years before the passing of 5 & 6 Vict. c. 45, C. set to music two songs, and in 1843, after the passing of that statute, he by deed assigned to D. and M. his "copyright" in the two musical compositions, together with all "property" and "benefit" therein. The interest of D. and M. in the musical compositions afterwards vested in H. & R. In 1878 C. purported to assign to A. "the sole liberty of performing or singing, or causing or permitting to be performed or sung," the musical compositions. A. thereupon caused entries to be made in the register at Stationers' Hall, representing him to be the sole proprietor of the liberty of performing the musical compositions:—

Held, upon motion by H. & R., that the entries must be expunged; for C., by the deed made in 1843, had granted the sole liberty of performing the musical compositions to D. & M., and therefore could not in 1878 grant it to A.

APPEAL of J. F. Adams from an order of Cockburn, C.J., and Mellor, J., expunging certain entries in the book of registry

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kept at the hall of the Stationers' Company. The facts are set out in the report of the proceedings before the Queen's Bench Division (1), and it is only necessary to state here the following circumstances.

About 1835 or 1836 two songs or poems, named respectively "Kathleen Mavourneen" and "Dermot Astore," were written by a Mrs. Crawford; they were afterwards set to music by Crouch. By a deed made in 1843, between Crouch of the one part and T. D'Almaine and T. G. Mackinlay of the other, after reciting that Crouch had written certain musical compositions (which included "Kathleen Mavourneen" and "Dermot Astore"), and had agreed to sell them to D'Almaine and Mackinlay, he, for valuable consideration, assigned unto them "all the present and future vested and contingent copyright of him, the said F. W. N. Crouch, of and in the said books, pieces, or compositions of music . . . and the sole and exclusive right and liberty of printing or otherwise multiplying copies thereof, and of every or any part thereof, and of publishing the same and every part thereof, under and by virtue of an Act of Parliament passed in the sixth year of the reign of her Majesty Victoria, intituled, "An Act to amend the Law of Copyright," and under or by virtue of an Act of Parliament passed in the 54th year of the reign of his late Majesty, George III., intituled "An Act to amend the several Acts for the encouragement of learning by securing the copies and copyright of printed books to the Authors of such Books or their Assigns," and every or any preceding Act or Acts of Parliament, as also by common law or otherwise; together with the sole and exclusive privilege of vending or causing the same books, pieces, or compositions of music, and every part thereof, and the copies thereof and of every part thereof to be sold, and all other the estate, right, title, interest, property, contingency, possibility, benefit, claim, and demand whatsoever, both at law and in equity, of him, the said F. W. N. Crouch, of and in the said books, pieces, or compositions of music, and every part thereof; to have, hold, receive, take, and enjoy the said books, pieces, or compositions of music aforesaid and copyright, and all and singular other the premises hereby bargained, sold, and assigned, or intended so to be,

(1) Ante, p. 90.

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with their and every of their rights and privileges unto and by the said T. D'Almaine and T. G. Mackinlay, their executors, administrators, or assigns, for their own absolute use and benefit in as full, ample, exclusive, and beneficial a manner to all intents and purposes, as he, the said F. W. N. Crouch, could or might have held or enjoyed the same in case these presents had not been made." All the interest of D'Almaine and Mackinlay in the two musical compositions afterwards vested in C. L. Hutchins and F. Romer. In August, 1878, Crouch assigned to J. F. Adams "the sole liberty of performing or singing, or causing or permitting to be performed or sung" the two musical compositions. J. F. Adams caused four entries, dated the 19th of September, to be made in the book of registry at Stationers' Hall, which in effect alleged that Crouch, as proprietor had assigned to him the liberty of representation, and two others, dated the 21st of August, and stating that Crouch and Adams had agreed to accept the benefits of 5 & 6 Vict. c. 45, for the extension of the term of liberty of performance.

C. H. Turner, for the appellant Adams. The judges of the Queen's Bench Division were wrong in holding that 5 & 6 Vict. c. 45 (1) did not confer any exclusive right to the performance of

(1) By 5 & 6 Vict. c. 45, s. 3, "The copyright in every book which shall after the passing of this Act be published in the lifetime of its author shall endure for the natural life of such author, and for the further term of seven years, commencing at the time of his death, and shall be the property of such author and his assigns: Provided always, that if the said term of seven years shall expire before the end of forty-two years from the first publication of such book, the copyright shall in that case endure for such period of forty-two years; and that the copyright in every book which shall be published after the death of its author shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns."

Sect. 4: "And whereas it is just to extend the benefits of this Act to authors of books published before the passing thereof, and in which the copyright still subsists; be it enacted that the copyright which at the time of passing this Act shall subsist in any book theretofore published (except as hereinafter mentioned) shall be extended and endure for the full term provided by this Act in cases of books thereafter published, and shall be the property of the person who at the time of passing of this Act shall be the proprietor of such copyright: Provided always that in all cases in which such copyright shall belong in whole or in

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musical compositions published before it was passed. Their attention was perhaps insufficiently directed to s. 20, which incorporates 3 & 4 Wm. 4, c. 15, and extends it to musical compositions. 5 & 6 Vict. c. 45 has a retrospective effect, and as the musical compositions in question were written less than ten years before it was passed, Adams is entitled under the assignment of August, 1878, to the sole liberty of performance. Perhaps it was unnecessary to register it; but the registration rendered

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part to a publisher or other person who shall have acquired it for other consideration than that of natural love and affection, such copyright shall not be extended by this Act, but shall endure for the term which shall subsist therein at the time of passing of this Act and no longer, unless the author of such book, if he shall be living, or the personal representative of such author, if he shall be dead, and the proprietor of such copyright shall, before the expiration of such term, consent and agree to accept the benefits of this Act in respect of such book, and shall cause a minute of such consent in the form in that behalf given in the schedule to this Act annexed to be entered in the book of registry hereinafter directed to be kept, in which case such copyright shall endure for the full term by this Act provided in cases of books to be published after the passing of this Act, and shall be the property of such person or persons as in such minute shall be expressed."

Sects. 2, 14, 20 (which incorporates 3 & 4 Wm. c. 15, and extends its provisions to musical compositions), and 22 are set out or sufficiently referred to in a note, ante pp. 90, 91.

By 3 & 4 Wm. 4, c. 15, s. 1, "From and after the passing of this Act the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment composed and not printed or published by the author thereof or his assignee, or which hereafter shall be composed, and not printed or published by the author thereof or his assignee, or the assignee of such author shall have as his own property the sole liberty of representing or causing to be represented at any place or places of dramatic entertainment whatsoever in any part of the United Kingdom of Great Britain and Ireland, in the Isles of Man, Jersey, and Guernsey, or in any part of the British dominions, any such production as aforesaid, not printed and published by the author thereof or his assignee, and shall be deemed and taken to be the proprietor thereof; and the author of any such production, printed and published within ten years before the passing of this Act by the author thereof or his assignee, or which shall hereafter be so printed and published, or the assignee of such author shall, from the time of passing this Act, or from the time of such publication respectively until the end of twenty-eight years from the day of such first publication of the same, and also if the author or authors, or the survivor of the authors, shall be living at the end of that period, during the residue of his natural life, have as his own property the sole liberty of representing or causing to be represented the same at any such place of dramatic entertainment as aforesaid, and shall be deemed and taken to be the proprietor thereof."

the proof of Adams's title more easy. For the respondents reliance may be placed upon the deed of 1843, whereby Crouch purported to grant to D'Almaine and Mackinlay the copyright of the musical compositions; but this was insufficient to pass the right of performance, for no entry was made in the registry book as required by 5 & 6 Vict. c. 45, s. 22; and even if the entry be not requisite the assignment being by deed, the right of performance is not expressly mentioned, and it cannot pass under the general words, for they are governed by the rule as to verba ejusdem generis, and can refer only to the incidents of the copyright mentioned in the operative words: *Reg.* v. *Cleworth.* (1) The counsel for the respondents may rely upon *Lacy* v. *Rhys* (2); but in that case the "acting right" was expressly assigned. At all events Adams is entitled to retain the entries dated the 21st of August, 1878; they were made in order to extend the period of copyright pursuant to the proviso in 5 & 6 Vict. c. 45, s. 4.

[BRAMWELL, L.J. That proviso is not in point; no copyright subsisted in these musical compositions when that Act was passed; and if the deed of 1843 effectually assigned the liberty of performance, Adams could not acquire it from Crouch in 1878.]

F. W. Raikes, for the respondents Hutchins and Romer. It is submitted that 5 & 6 Vict. c. 45, is not retrospective, and that the ground of the decision in the Queen's Bench Division was right; the statute is of a penal nature and ought to be construed strictly. If, however, this contention cannot be sustained, then it is submitted that by the deed of 1843 the liberty of performance was effectually vested in D'Almaine and Mackinlay; s. 22 relates to assignments by entry in the registry book; it was not intended to apply to assignments by deed.

C. H. Turner, replied.

BRAMWELL, L.J. I think that the order of the Queen's Bench Division must be affirmed, but not upon the ground upon which this case was decided by that Court. The construction of 5 & 6 Vict. c. 45, was not properly brought before the judges of the Queen's Bench Division, and somehow the force of s. 20 seems to

(1) 4 B. & S. 927; S.C. sub nom. *Reg.* v. *Silvester*; 33 L. J. (M.C.) 79. 10 Jur N S 360

(2) 4 B. & S. 873; 33 L. J. (Q.B.) 157. 10 Jur N S 612

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have escaped notice. That enactment has manifestly a retrospective effect, for it incorporates 3 & 4 Wm. 4, c. 15, and extends its benefits to musical compositions. It has been argued that the statute ought not to be construed retrospectively, because it is of a penal nature; but the answer is that it does not inflict penalties for acts done before it was passed. I think, therefore, that the view of the Queen's Bench Division as to whether the statute was retrospective cannot be maintained. The decision, however, must be affirmed upon the ground that at the time when the entries sought to be expunged were made, Crouch had parted with his interest in the musical compositions. It may be that there is a difference between a book and the right to perform a musical composition: the former is a chattel, the latter does not exist in a material shape. The question turns upon the language of the deed made in 1843; the copyright in the songs is assigned together with all "interest, property, contingency, possibility, benefit" in the musical compositions. I think that the right to perform the musical compositions was included in the words "interest, property, benefit;" for Crouch was the only person who could license their performance. These words are very general, and no doubt were intended to have a wide operation: we are now asked to limit their meaning. I do not think that we ought to do so. The entries in the Book of Registry must be expunged. I wish to add that owing to 5 & 6 Vict. c. 45, s. 22, perhaps *Cumberland* v. *Planché* (1) is not now law; but here other words than "copyright" are used.

BRETT, L.J. I think that the statute 5 & 6 Vict. c. 45, is retrospective: by s. 20 it incorporates 3 & 4 Wm. 4, c. 15, and extends its provisions to musical compositions. The latter Act applies to dramatic pieces published ten years before it was passed, and therefore, even if 3 & 4 Wm. 4, c. 15 is to be considered as enacted with reference to musical compositions only from the 1st of July, 1842, when 5 & 6 Vict. c. 45 was passed, it will apply to the musical compositions "Kathleen Mavourneen," and "Dermot Astore," which were composed within ten years before the 1st of July, 1842. Sect. 28 of 5 & 6 Vict. c. 45 was intended

(1) 1 A. & E. 580.

to preserve contracts and obligations previously entered into, and does not extend to this case. Therefore 5 & 6 Vict. c. 45 has a retrospective effect with regard to musical compositions, and the ground of the decision in the Queen's Bench Division was erroneous; but the order appealed from must be upheld, because in 1868 when Crouch purported to assign the liberty of performance he was not the proprietor of it; for before he assumed to pass the liberty of performance to Adams, he had granted it to D'Almaine and Mackinlay, through whom Hutchins and Romer claim. By the statutes relating to copyright a distinction has been drawn between the liberty of performing a dramatic piece or musical composition and the copyright in the book containing it, and we are bound to assume that this was done intentionally. The question turns upon the construction of the deed made in 1843; by the operative words Crouch sold and assigned to D'Almaine and Mackinlay the copyright in the musical compositions, and the sole and exclusive right of multiplying copies thereof together with the exclusive privilege of selling the same, "and all other the estate, right, title, interest, property, contingency, possibility, claim, and demand whatsoever, both at law and in equity" of Crouch. In my opinion the right to exclusive performance passed under the word "property," and also, I incline to think, under the word "benefit." It has been argued that this construction ought not to be adopted, because these are general words coming after particular words dealing with the copyright only, and that the rule as to the interpretation of verba ejusdem generis must be followed. I very much doubt whether that rules applies to deeds, because they are to be construed most strongly against the grantor; but a decisive reason for not applying that rule is that the words "property" and "benefit" are not in immediate sequence to the assignment of the copyright, but are introduced by the phrase "together with:" I think that the parties plainly intended that the words "property" and "benefit" should pass something different from and additional to what passed by the transfer of the copyright. For these reasons it appears to me clear that after the execution of the deed of 1843 the right of performance did not remain in Crouch, and that he had no interest which he could sell to Adams. All the entries in question in this case must be struck out.

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COTTON, L.J. I think that 5 & 6 Vict. c. 45 had a retrospective operation, and that it did apply to musical compositions published within ten years before it was passed. However, the order of the Queen's Bench Division must be affirmed, because at the time when Adams got an assignment of the sole liberty of performing or singing from Crouch, the latter had previously transferred it to D'Almaine and Mackinlay. The right of exclusive performance of a musical composition is entirely created by statute, and is declared to be the property of the author. By 5 & 6 Vict. c. 45, s. 22, it is enacted that the assignment of the copyright in a book containing a dramatic piece or musical composition shall not convey the right of performing it, unless the intention of the parties that the right of performance shall be assigned is expressed by an entry in the registry book; but I incline to think that this enactment was not meant to control the operation of deeds of assignment, but only to regulate the effect of entries in the registry book. Looking to the deed of 1843 itself, I think that its terms are wide enough to convey to D'Almaine and Mackinlay the liberty of performance; the general words, especially "property" and "benefit" are sufficiently sweeping to include every advantage, which was vested in Crouch with respect to these musical compositions.

For Adams it has been argued that, even if the entries of the 19th of September ought to be expunged, he is nevertheless entitled to retain those of the 21st of August, representing that Crouch and Adams had agreed to accept the benefits of 5 & 6 Vict. c. 45 for the extension of the term of liberty of performance; and reliance was placed upon the proviso in s. 4 of that statute. I do not think that it applies to the present case; it referred to copyright subsisting at the time when it was passed; but the exclusive liberty of performing a musical composition was introduced by that statute.

All the entries were wrongfully made, and must be expunged.

Appeal dismissed.

Solicitors for appellant: *Walter Jarvis & Triscott.*
Solicitor for respondents: *H. S. Russell.*

[IN THE COURT OF APPEAL.]

1879
July 1.

MARTIN *v.* BANNISTER AND ANOTHER.

County Court—Jurisdiction of County Court to grant and enforce Injunction against Nuisance—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8; *s.* 89; *Order XLII., rule* 5.

A county court, under the Judicature Act, 1873, s. 89, has in actions within its jurisdiction power to grant an injunction against a nuisance and to enforce obedience to it by committal.

APPEAL of the defendants from an order of the Queen's Bench Division that the judge of the county court of Warwickshire, holden at Coventry, should hear and adjudicate upon the application of W. Martin, the plaintiff in a certain action in the county court, for the committal of F. P. Bannister and S. P. Bannister, the defendants in the action. (1)

The facts are sufficiently stated in the report of the case in the Queen's Bench Division.

Wilberforce and *Dugdale* (*Knott*, with them), for the defendants.
Bigham, for the plaintiff.

BRAMWELL, L.J. I am of opinion that this judgment ought to be affirmed, and I agree entirely with the reasons given by Kelly, C.B., and Pollock, B., for their judgments. It is not necessary for me to add more. But there is one remark which I would like to make. The argument is that s. 89 gives no new jurisdiction to the Court; and that when a plaintiff applies to a county court for damages and an injunction at the same time, he sets up two causes of action; one actual damage already suffered, and the other damage apprehended in the future. That doctrine is subtle. I am not sure that the county court would have jurisdiction, if the only cause of action were apprehended damage. But if there has been actual damage, there is but one cause of action for which there are two remedies; damages and an injunction. The county court, then, has power to entertain a claim for damages

(1) Ante, p. 212.

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and at the same time for an injunction to prevent a repetition of the injury. As to attachment, it is only necessary to shew that an injunction may be granted, to prove that an attachment may also be granted. It is said an attachment is not part of the remedy given by the Court, but a punishment inflicted for disobedience to an injunction, but that is not really so; it is part of the remedy, which consists of an injunction and consequent attachment. The remedy is, in fact, an injunction enforceable by attachment.

BRETT, L.J. The first point argued was that the county court has no power to issue an injunction, because it is said that an injunction is not a remedy, but a cause of action. I cannot see how an injunction can be called a cause of action; if it were so, it must exist before the action was brought, but an injunction does not. One cause of action is the existence of a nuisance, another may be the apprehension or threat of a nuisance. Those are both causes of action; but it may be that when there is only a threat of a nuisance, it may not be within the jurisdiction of a county court to grant an injunction. That point I do not decide. But here there is a clear cause of action; that cause of action is the existence of a nuisance; but it is said that on such a cause of action the county court could not issue an injunction. As soon as it is admitted that an injunction is not a cause of action but a remedy, the power of the county court to grant an injunction becomes clear.

Then it is said that the county court has no power to enforce the injunction by attachment, for the commitment is not a "remedy," but a punishment for disobedience.

It is plain that the High Court would have power to commit, if the action were in the High Court; they could grant an injunction and commit the person, against whom it was granted until it was obeyed. It may be that power was given to the Court by s. 16 of the Judicature Act, 1875, or it may be it is derived from Order XLII., rule 5. But whether it is derived from that rule or not, it is clear that if the action had been brought there, the High Court would have such power. Then is the attachment part of the remedy or a punishment? If it were a punishment, the Court would not take it off; no Court has power to take off a punishment which it has once inflicted, but the power of the Court to take off the attach-

ment on the injunction being obeyed shews it is part of the redress given in order to enforce the injunction. As the attachment is part of the redress, the county court has a right not only to grant an injunction, but to enforce it by attachment.

COTTON, L.J. There are two questions for our decision; first, has a county court jurisdiction to grant an injunction in a case in which a nuisance has actually been committed; secondly, can the county court enforce such injunction by attachment? There were two modes in which injunctions could be granted in Chancery: where the applicant had good reason to apprehend a nuisance would be committed, the Court would grant him an injunction: where the applicant had suffered actual damages, there also the Court of Chancery would grant an injunction as an additional remedy. At common law a party was entitled merely to recover damages. The Court of Chancery would also grant an injunction to prevent a repetition of the injury. That the granting of an injunction was merely an additional remedy, and not a new cause of action, is shewn by the fact that the Court of Chancery would give no damages, but only granted an injunction; and the Common Law Courts could not grant an injunction but merely gave damages. It is unnecessary to decide whether the county court has power to restrain an apprehended wrong. Here there is a wrong which has actually been committed and which the Court has dealt with in an action for damages. Sect. 89 of the Judicature Act, 1873, gives a county court power to grant the remedy, which under the Judicature Act the High Court is enabled to apply.

As to the second point, I think that the county court has power to enforce its injunctions by attachment. The power is given by s. 89, and must be exercised in the manner and form pointed out by the county court rules. I do not rely on the rule as giving jurisdiction, but as regulating the manner in which it is to be exercised.

Judgment affirmed.

Solicitors for plaintiff: *Chester & Co., for Giles, Nuneaton.*
Solicitor for defendants: *Fluker, for Estlin, Nuneaton.*

1879
Aug. 9.

BARNES *v.* LOACH.

Easement—Light—Unity of Ownership—Dominant Tenement under Lease at time of Severance of Ownership—Alteration of Dominant Tenement—Destruction of Easement.

The implication of a grant of easements of a continuous and apparent character, upon the alienation to different persons of tenements previously in the ownership of the same person, is not prevented by the fact that the dominant tenement at the time of the alienation is in lease, and consequently not in the possession of the alienor.

There being a right to the access of light to windows in the walls of certain cottages, the walls of some of the cottages were set back and windows made in the new walls of the same size, and in the same relative positions as the former windows in the former walls:—

Held, that the easement of light was not thereby destroyed.

In the case of another of the cottages the occupier made an addition thereto, and for the purpose of so doing built a new wall with a window in it outside the old wall and window at a different angle, but the old window remained inside the new one, and still continued to receive the light:—

Held, that the right to the access of light to the old window was not destroyed.

Special Case, the facts of which were, so far as material, as follows:—

It appeared that one Robert Barnes was in 1822 the owner in fee of certain land coloured yellow in the plan annexed to the case, upon which a row of cottages had been built, and was also owner in fee of certain land coloured green in the plan, which adjoined the land coloured yellow.

In 1812 the then owner of the land coloured yellow, the predecessor in title of Robert Barnes, had demised it to one Yeates for thirty-one years from Christmas, 1811.

On the 18th of February, 1822, Robert Barnes by will specifically devised the "green" land to one Addison, the defendant's predecessor in title, and the "yellow" land passed under a residuary devise to his brother, John Barnes. Robert Barnes died on the 22nd of May, 1822.

On the 18th of August, 1830, John Barnes devised the "yellow" land to the present plaintiff's predecessors in title. On the 8th of September, 1836, John Barnes accepted a surrender of the before mentioned lease of the "yellow" land, and granted a new

lease thereof for thirty-one years, as from Midsummer, 1836, to Messrs. Hoare the brewers. John Barnes died in 1849. In 1852 Addison sold the "green" land to one Whyte, and on the 30th of October, 1854, Whyte granted a lease of the "green" land to Messrs. Hoare for fourteen years from Midsummer, 1853, which expired on the 24th of June, 1867, contemporaneously with the lease they held of the "yellow" land.

Up to the 24th of June, 1867, the "green" land had been used as gardens to the cottages on the "yellow" land, numbered 4 to 20 Globe Road, each garden being separated from the next garden by a low fence. There was no fence dividing the garden from the cottage to which it was attached.

The cottages were built of a uniform plan in front, but not so at the back (the side abutting on the "green" land). There were abutments or outhouses attached to the back of each cottage, but some of them had been altered as hereinafter appears.

On the determination of the two leases above mentioned a question arose between the plaintiff and the defendant's predecessors in title, as to what was the boundary between the "green" land and the "yellow" land. The boundary having been settled between them, it was found that certain of the cottages projected on to the defendant's land. They were accordingly set back to their existing position.

It appeared that there had been windows in the walls of the cottages abutting on the "green" land as originally built. In the case of certain of the cottages that were set back windows had been made in the new wall of the same size and in the same relative positions in the wall as that which the old windows occupied in the former wall, but in a different plane. In the case of one of the cottages, No. 18, the occupier had made an addition to it since 1822, and in so doing had built a wall with a window in it outside and at a different angle to the old wall and window, but the old window still remained inside the new window and continued to receive the access of light over the "green" land.

The will of Robert Barnes did not expressly refer to any easement of light, the residuary devise being of all the residue of the testator's lands, tenements, and hereditaments, according to the several natures, tenancies, and qualities thereof.

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The questions for the Court were:—

1. Whether Robert Barnes by his will granted an easement of light over the "green" land.

2. If he did so grant such an easement, whether it was destroyed by the setting back the walls and opening in the walls so set back new windows of the same size and in the same relative position as the former windows in the former walls.

3. Whether if such grant existed, the fact of the occupier of No. 18 having erected a wall and window in it outside and at a different angle to the old window, destroyed the easement of light to the old window.

May 6. *Archibald* (*Tomlinson*, with him), for the plaintiff. Upon the devise of the two properties to different persons, those quasi easements of an apparent and continuous character, such as the easement of light, which had been used with the "yellow" land over the "green," passed to the devisee of the "yellow." *Pyer* v. *Carter* (1); *Swansborough* v. *Coventry* (2); *Suffield* v. *Brown* (3); *Crompton* v. *Richards* (4); *Watts* v. *Kelson* (5); *Pearson* v. *Spencer*. (6) With regard to the alterations made in the cottages, the easement was not thereby destroyed. Moving the window back does not increase the burden on the servient tenement, but rather lessens it. The nature of the enjoyment was not substantially altered. With regard to the window in No. 18, there was nothing that amounted to an abandonment of the easement. The old window remained and the light had access to it as before. [He cited on this point *Tapling* v. *Jones* (7); *National, &c., Plate Glass Insurance Co.* v. *Prudential Assurance Co.* (8); *Blanchard* v. *Bridges*. (9)]

Finlay, for the defendant. The doctrine of *Pyer* v. *Carter* (1) has no application to the present case. In order that it may apply, the original owner must have been in possession of both tenements. Here he never was in possession or control of the "yellow" land. By the "destination du père de famille" is meant the arrange-

(1) 1 H. & N. 916.
(2) 9 Bing. 305.
(3) 4 D. J. & S. 185; 33 L. J. (Ch.) 249. 10 Jur N.S. 111
(4) 7 Price, 27.
(5) Law Rep. 6 Ch. 166.
(6) 1 B. & S. 571.
(7) 11 H. L. C. 290. 7 Jur N.S. 1195 11 Jur N.S. 369
(8) 6 Ch. D. 757.
(9) 4 Ad. & E. 176.

ment made by the proprietor of several heritages for their respective use. Gale on Easements, 5th ed. p. 97. This doctrine cannot apply where the owner has no power to interfere with the existing arrangements. Robert Barnes could not have interfered with the windows in the cottages. The basis of the doctrine is that the proprietor has himself made or allowed to continue certain physical arrangements with respect to the use of the two properties in favour of one of them.

Secondly, the residuary devisee is in the position of the testator's heir with regard to the devisee of the land specifically devised and cannot derogate from the testator's grant. The doctrine of *Suffield* v. *Brown* (1) therefore applies.

Thirdly, the easement, if any, was destroyed by the alterations that were made in the case of No. 18, and the cottages that were set back.

[He also cited *Ellis* v. *Manchester Carriage Co.* (2)]

Archibald, in reply. The doctrine of "destination du père de famille," does not turn on the possession by the owner of both properties, but on their structural condition at the time of the conveyance or devise. [He cited *Hinchcliffe* v. *Earl of Kinnoul.* (3)]

Cur. adv. vult.

August 8. The judgment of the Court (Cockburn, C.J., and Lopes, J.) was delivered by

LOPES, J. This was a special case settled by an arbitrator in which three questions are submitted for our decision. The first is whether an easement of light, over the part coloured green on the plan annexed to the case, passed by the will of Robert Barnes to the plaintiff's predecessors in title. If the owner of an estate has been in the habit of using quasi easements of an apparent and continuous character over the one part for the benefit of the other part of his property, and aliens the quasi dominant part to one person and the quasi servient to another, the respective alienees will, in the absence of express stipulation, take the land burdened or benefited, as the case may be, by the qualities which the

(1) 4 D. J. & S. 185; 33 L. J. (Ch.) 249.

(2) 2 C. P. D. 13.

(3) 5 Bing. (N.C.) 1.

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previous owner had a right to attach to them. It is said, however, that in 1822, when Robert Barnes made his will and died, the yellow was under lease to one Yeates for thirty-one years from Christmas 1811, and that consequently the law as above stated does not apply, because Robert Barnes was not in possession of the yellow and had therefore no control over it at the time he made his will. If this contention were to prevail, the salutary principle of law, with regard to the passing of manifest and apparent easements by implied grant on the subdivision of a property, would be defeated whenever one part of it was demised for any period however short, because the owner would not be in actual possession of both parts of the property at the time of alienation. This would create great inconvenience, and we should require strong authority to induce us to give effect to this contention. No authority bearing upon the point was brought to our notice. *Suffield* v. *Brown* (1) and *Ellis* v. *Manchester Carriage Co.* (2) were cited. But these cases do not seem to us in point, having been cases in which the owner of two adjoining tenements parted with one of them retaining the other himself.

The green was used as garden ground by the occupiers of the yellow, and the enjoyment of the easement of light and air over the green must have been acquiesced in by Robert Barnes, for it was a servitude which he might have resisted if he thought fit. In these circumstances we think the enjoyment of the easement over the green by the occupiers of the yellow was the same as if Robert Barnes had himself been in possession of the yellow, and that the same incidents attached.

We are further asked whether, if an easement passed, it was destroyed by the setting back of the walls and opening in the walls so set back of new windows of the same size, and in the same relative position as the former windows in the former walls. We are of opinion that the easement was not destroyed. If the alteration in a dominant tenement, or in the mode of using an easement, is not of such a nature that the tenement is substantially changed, or the burden on the servient tenement materially increased, an easement is not destroyed in consequence of the alteration. Here the dominant tenement was not substantially changed,

(1) 4 D. J. & S. 185; 33 L. J. (Ch.) 249. (2) 2 C. P. D. 13.

nor was the burden on the servient tenement materially increased, but rather lessened.

We are also asked whether, if the easement passed, the fact of the occupier of No. 18 having erected a wall and window in it outside, and at a different angle to the old window, destroys the easement of light to the old window. It does not appear that there has been any alteration in the old window. It remains as it was, and light has always been enjoyed by it. We do not think that the occupier of No. 18 has, by what he has done, destroyed the easement of light to the old window. It is much the same as if the occupier of No. 18 had placed a new window by the side of the old one. In such a case it could not be contended that because a new window had been so placed, the light through the old window had been lost without any evidence whatever of an abandonment. It is contended that the addition of this outside window changed the character of the easement so as entirely to destroy it. It is difficult to comprehend how this effect can be produced by an act which in no way alters the old window, which is carefully preserved in its original state inside the new one. We answer all three questions in favour of the plaintiff.

Judgment for the plaintiff.

Solicitors for plaintiff: *Tweedies.*
Solicitors for defendant: *Crouch & Spencer.*

1878
Nov. 25.

[IN THE COURT OF APPEAL.]

BORROWMAN, PHILLIPS, & CO. *v.* FREE & HOLLIS.

Sale of Goods—Tender of Goods not in accordance with Contract—Subsequent Tender of Goods in accordance with Contract.

The defendants agreed to buy of the plaintiffs a cargo of maize. The plaintiffs tendered the cargo of the *C.*, which the defendants refused to accept, upon the ground that the shipping documents were not tendered with it. The plaintiffs insisted that the tender was valid. This dispute was referred to an arbitrator, who decided that the tender was invalid. The plaintiffs thereupon, and within the time limited by the contract, tendered the cargo of the *M.*, which the defendants refused to accept upon the ground that they were not bound to accept any cargo in substitution for that of the *C.*, the tender of which the arbitrator had decided to be invalid:—

Held, that the defendants were bound to accept the cargo of the *M.*, and might be sued by the plaintiffs to recover any loss which the latter might have sustained through the refusal to accept it.

ACTION for damages for not accepting and paying for a cargo of maize.

The plaintiffs sued upon a contract the benefit of which, with all rights under it, had been assigned to them; the following were the material portions:—

"London, May 7th, 1877.

"Sold to Messrs. Free & Hollis a cargo of mixed American maize . . . . say three to four thousand quarters of 480 lbs., as per bill of lading, to be dated between the 15th of May and 30th of June inclusive, at the price of thirty shillings and sixpence per 480 lbs. Payment by cash in London in exchange for shipping documents . . . . or by the buyer's acceptances at sixty days' sight from date of arrival of bill of lading in London, with shipping documents attached, as usual. Sellers to render invoice within seven days of arrival of bill of lading in England."

The contract contained a clause providing that any dispute should be referred to arbitration.

At the trial before Denman, J., it was proved that the plaintiffs offered to the defendants a cargo to arrive by a vessel called the *Charles Platt*, and stated that they had not then received the shipping documents. The defendants refused to take this cargo,

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on the ground that the shipping documents had not arrived; the plaintiffs, however, persisted in their offer. Under the provision in the contract this dispute was referred to arbitration, and the arbitrator decided that the defendants were not bound to accept the cargo of the *Charles Platt* in performance of the contract. The plaintiffs afterwards, on the 9th of July, offered the cargo of a vessel called the *Maria D.*, stating in their letter, "bill of lading to hand to-day, and dated about the 24th of June," and asking the defendants which of the modes of payment provided in the contract they preferred. The defendants refused to accept the cargo of the *Maria D.*, on the ground that they were not bound to accept any cargo in substitution for that of the *Charles Platt*, the offer of which the arbitrator had decided to be invalid. The plaintiffs did not, in point of fact, receive the shipping documents of the *Maria D.* until the 4th of August, and there was some evidence that on the 9th of July her cargo did not belong to them. The plaintiffs having sustained a loss upon the sale of the cargo, sued the defendants to indemnify themselves against it.

The defendants contended that there had been no valid tender of the cargo of the *Maria D.*, inasmuch as the shipping documents were not tendered at the same time. The plaintiffs alleged that the tender had been waived. Denman, J., found for the plaintiffs upon the question of waiver; but he gave judgment for the defendants on the ground that the plaintiffs had appropriated the cargo of the *Charles Platt* in satisfaction of the contract, and that after the arbitrator had decided that the defendants were not bound to accept it, the plaintiffs could not lawfully tender the cargo of any other vessel.

The plaintiffs appealed.

November 23, 25. *Herschell, Q.C.*, and *A. L. Smith*, for the plaintiffs.

Benjamin, Q.C., *Philbrick, Q.C.*, and *Reginald Brown*, for the defendants.

The arguments are sufficiently noticed in the judgments.

Brown v. *Royal Insurance Co.* (1) was cited as to the effect of an election made in pursuance of a contract.

(1) 1 E. & E. 853; 28 L. J. (Q.B.) 275.

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BRAMWELL, L.J. I think that this judgment cannot be supported. I will deal first with the second point, which has been made before us on behalf of the defendants, namely, that the plaintiffs were not in a condition to tender the cargo of the *Maria D.*, because it did not then belong to them. I think that this point was not taken at the trial, and if it had been the plaintiffs would have been able to meet it. I think that that is clear upon the construction of the documents and upon the facts before the Court. All that the sellers were bound to do under the contract of sale was to name the ship and to send on the invoice within the proper time. This they did, and the buyers were then to declare their option as to the mode of payment. It was contended at the trial that the tender was insufficient, because it was not accompanied with the shipping documents of the *Maria D.* I think it clear that it was unnecessary that at the time of the tender the sellers should have them in their possession. The performance of the contract does not depend upon that circumstance. As I have already said, before us the contention has been urged that the cargo of the *Maria D.* was not the plaintiffs'. Now, I quite allow that although a contention is not formally made at the trial, yet if it is obvious upon the face of the evidence it may be urged before us when the case is considered in all its aspects. This objection, however, is of a doubtful nature. Moreover, the plaintiffs might have met it by evidence that they had previously bought it; but, even if they had not bought it, the objection seems to me unsustainable; it is quite competent for a man to sell what does not belong to him: before the time for performance he may have bought it or procured the assignment of it, and be ready to fulfil his contract. The contention for the defendants is not maintainable either in the shape taken at the trial or in the form urged before us.

As to the main point in the case I cannot agree with the view of Denman, J. In due course after the contract had been entered into the *Charles Platt* arrived, but the shipping documents had not reached the plaintiffs when they offered her cargo to the defendants. The latter objected that under the contract they were not bound to take it without the shipping documents. This objection was not allowed by the plaintiffs, and the question was

referred to arbitration. The arbitrator was of opinion that the plaintiffs could not insist upon the tender. It is unnecessary to express any opinion as to the decision of the arbitrator. The plaintiffs then offered a second ship, the *Maria D.*, within the time limited by the contract. It has been argued that by the tender of the *Charles Platt* the option of the plaintiffs was determined, and that the position of the parties is the same as if the *Charles Platt* had been named in the contract, and that no other ship could be declared. I do not think this argument maintainable. Suppose that a clause had been inserted, that no ship was to be declared whose shipping documents had not then arrived in England. A clause of that kind would be repugnant to the theory that the contract is to be treated as if the *Charles Platt* had been the ship named in it. The case may be shortly stated as follows: if the *Charles Platt* was a proper ship, the plaintiffs were entitled to tender her cargo; if she was not, they were entitled to withdraw the tender, and instead of the cargo of the *Charles Platt* to offer that of the *Maria D.* The defendants have relied upon *Gath* v. *Lees* (1), but the decision is distinguishable. In that case cotton was "to be delivered at seller's option in August or September, 1864." The seller elected to exercise that option in August, and notice that it would be so exercised was accepted by the buyers. The seller had a right to exercise that option; but in this case, upon the defendants' hypothesis, the plaintiffs by naming the *Charles Platt*, exercised their option in an improper manner; therefore they had a right to withdraw their tender, and to exercise it in a proper manner. That case shews that this action is maintainable. The judgment of Denman, J., must be reversed.

BRETT, L.J. I also think that the judgment of Denman, J., must be reversed. The plaintiffs offered, and were ready and willing, to deliver the cargo of the *Maria D.*, but the defendants refused to accept it. The defendants say that the plaintiffs might in fact be ready and willing to offer the cargo, but that they could not do so in law, because they could not at the time tender the bills of lading. This objection seems to me unsustainable, for the

(1) 3 H. & C. 558.

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shipping documents might have been delivered within a reasonable time. The objection that the defendants were not possessed of the cargo of the *Maria D.* was not raised at the trial, and cannot be taken now. It was further argued that if the cargo of the *Maria D.* could be properly tendered, it was not tendered in point of fact, and that the tender of it was not waived by the defendants. I am of opinion that they did waive it, for they insisted that they were not bound to accept the tender of any vessel after the plaintiffs had offered the *Charles Platt.*

I now pass to the point, upon which the judgment of Denman, J., was given. It has been argued by the defendants' counsel that the plaintiffs could not lawfully tender the cargo of the *Maria D.*, because they had already tendered that of the *Charles Platt*, and had insisted upon that tender. The doctrine of election was relied upon, and it was urged that, even if the offer of the *Charles Platt* was not of itself a sufficient election, the plaintiffs were ousted of their right to sue in this action by referring the matter to arbitration. It may be that that if the plaintiffs had recovered damages in an action for not accepting the cargo of the *Charles Platt* they could not maintain this suit; but in the present case there were no trial and judgment, it was only a reference to arbitration, whether the plaintiffs could according to mercantile usage tender the cargo of the *Charles Platt.* The question comes down to the narrow point, whether the plaintiffs are barred by the doctrine of election. For the defendants reliance has been placed upon a passage in Blackburn on Contract of Sale, pp. 128, 129, to the effect that when in pursuance of a contract to sell unspecified goods the vendor has appropriated certain goods, he has made an election which is irrevocable; but I think that passage has nothing to do with the principle to be applied in the present case. It may be that, where goods which fulfil the terms of a contract are appropriated for sale in performance thereof, there is an election by the vendor which is irrevocable; but here the contention for the defendants is that the cargo of the *Charles Platt* was not in accordance with the contract. So far as *Tetley* v. *Shand* (1) is relevant to this case, the decision is not impeached by the view which I take. *Thornton* v.

(1) 25 L. T. (N.S.) 658.

Simpson (1) I need only mention in order to say that in my opinion it has nothing to do with this case. *Gath* v. *Lees* (2) was not decided upon the doctrine of election, but upon the ground that the defendants, having acted upon the notice of the plaintiff, had altered their position for the worse; it was not decided by the Court of Exchequer that, if the position of the defendants had remained unaltered, the plaintiff would have been bound by his first offer and could not have withdrawn it. The doctrine of election did not apply to that case. I have only to add that a different rule might have been applied, if the defendants had accepted the cargo of the *Charles Platt;* it is possible that the tender of the plaintiffs could not in that case have been withdrawn. I wish it however to be understood, that this is a point upon which I express no opinion.

COTTON, L.J. I agree that the judgment of Denman, J., cannot be sustained. The action is for not accepting the cargo of the *Maria D.* The defendants objected that there was no tender of it. I will assume for the moment that there was no tender; but the objection is answered by the circumstance that there was a waiver of the tender by a refusal to accept delivery of the cargo. It has been said that this waiver was obtained by a mistaken representation by the plaintiffs that the bill of lading was in their possession; but this point was not taken at the trial; if it had been taken at the trial, it might have been met by evidence, and the Court of Appeal ought not to allow it to be insisted upon; even if they were not in possession of the bill of lading of the *Maria D.*, they might have got, and did get, possession of it; and they did no wrong, if they made the offer having the cargo under their control, but not having it in their possession. I must therefore assume that the tender of the *Maria D.* was in itself valid.

As to the tender of the *Charles Platt* it is to be remarked that when a selection is made of goods not specified in the contract, the goods selected, if they comply with the conditions of the contract, must be treated as if they had actually been named in the contract, but in the present case the defendants rejected the offer of the cargo of the *Charles Platt,* and the dispute was referred to

(1) 6 Taunt. 556. (2) 3 H. & C. 558.

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arbitration, and it was ultimately decided that the offer was not one which the plaintiffs were at liberty to make; if there had been an election within the terms of the contract, it would have been binding upon the defendants; here however it was assumed that neither party was bound, and that the plaintiffs were in the wrong; the offer of the cargo of the *Charles Platt* was withdrawn, and the plaintiffs, as they were at liberty to do, offered another. It was said that if after the cargo had been objected to, another had been immediately offered, the rule to be applied might have been different. I do not think so. I cannot agree that the arbitration was equivalent to a judgment for damages in an action: the question at the arbitration was merely whether the plaintiffs were wrong in tendering that cargo. As to *Gath* v. *Lees* (1) I wish to remark that in that case the position of the defendants had been altered by their acceptance of the plaintiff's offer; the plea was good as an equitable defence; but I also think it good as a legal defence. A contract had been arrived at, which was acceptable to both parties, and it could not be altered without the assent of both parties.

Judgment reversed.

Solicitors for plaintiffs: *Plews, Irvine, & Hodges.*
Solicitors for defendants: *Philbrick & Corpe.*

(1) 3 H. & C. 558.

[IN THE COURT OF APPEAL.]

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June 23.

THE QUEEN ON THE PROSECUTION OF R. BOLTING, APPELLANT, *v.* FRENCH (CLERK TO THE TRUSTEES OF THE LITTLEHAMPTON FERRY AND ROADS UNDERTAKING), RESPONDENT.

Turnpike Road—Highway, Contribution to Repair of, out of Highway Rate—4 & 5 Vict. c. 59, s. 1.

An Act of Parliament authorized trustees to establish a ferry and make certain highways in connection therewith. The trustees were also empowered to take tolls, out of the proceeds of which the ferry and roads were to be maintained. No limit of time was specified by the Act for the expiration of the trust. The Act also provided that, in case the works thereby authorized should not be executed within the space of ten years, all the powers and authorities thereby given should cease and determine, save only as to so much of the work as should have been completed within that time.

The trustees established the ferry and made all the roads specified in the Act but one. The funds arising from the tolls becoming insufficient for the repair and maintenance of the roads so made, an application was made by the trustees to justices for an order for contribution to the repair of one of the roads so made, out of the highway rate under 4 & 5 Vict. c. 59, s. 1:—

Held (affirming the decision of the Queen's Bench Division), that the trust created by the Act was a turnpike trust within the meaning of 4 & 5 Vict. c. 59; and, secondly, that, inasmuch as the Act merely authorized and did not compel the making of the roads thereby specified and contemplated that all the works might not be executed, the construction of the whole system of roads authorized to be made was not a condition precedent to the roads that were made becoming highways, and consequently that an order of contribution to the repair of the road in question might be made under 4 & 5 Vict. c. 59, s. 1.

Rex v. *Cumberworth* (3 B. & A. 108) overruled.

APPEAL against an order of the Queen's Bench Division quashing an order of Sessions, made upon the appeal of R. Bolting, surveyor of highways for the parish of Rustington, in the county of Sussex, against a certain order made by two justices of the county of Sussex, dated the 13th of November, 1876, whereby R. Bolting was ordered to pay to R. French, as clerk to the trustees of the Littlehampton Ferry and Roads Undertaking, the sum of 150*l.* at such times and to be laid out in such manner as in such order specified. (1)

The following facts appeared on a case stated by the Court of Quarter Sessions for the opinion of the Queen's Bench Division:

(1) 3 Q. B. D. 187.

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By 5 Geo. 4, c. xciv., "An Act for establishing a ferry on the river Arun at Littlehampton, in the county of Sussex, and making roads to communicate therewith," certain trustees were appointed to carry out the undertaking.

By s. 16 power was given to establish a ferry for carriages, horses, cattle, and foot-passengers, and portable articles over the river Arun at Littlehampton.

By s. 18 it was provided: "It shall and may be lawful to and for the trustees to make, and cause to be made, a proper and commodious road for such ferry to be established as aforesaid on the west side of the river Arun to and into the road leading from Bognor to Arundel at the west end of Grevatt Lane, in the parish of Yapton in the said county; and also one other proper and commodious road from such ferry to be established as aforesaid on the east side of the said river to and into the village of Rustington in the said county, and also a proper and commodious branch road from the street of Littlehampton aforesaid by the beach houses to the south end of the lane leading from the church of Rustington to the sea shore . . . and the said roads shall be made and at all times afterwards maintained and repaired at the proper costs and charges of the said trustees by and out of the tolls by the Act granted."

Sects. 49 to 52 and s. 71 provided for the taking of tolls.

By s. 72, in case the works should not be completed within the space of ten years, all the powers and authorities of the trustees should cease and determine, save only as to so much of the work as should have been completed within the time.

The road from the ferry to be established on the east side of the river Arun to and into the village of Rustington had never been made by the trustees. With the exception of this road being on the east side of the river, and with the exception of portion of the road in respect of which the contribution was claimed lying at the extreme west thereof, which portion was made by and at the expense of the parish of Rustington, the trustees had made the several roads mentioned in the Act of Parliament and had taken thereon the full amount of the tolls specified in the Act, and had expended such tolls in the repair of the roads and other purposes of the Act.

The branch road from Littlehampton to Rustington being out of repair and the trustees having no funds, the respondent, on an application to justices at Special Sessions, obtained an order under 4 & 5 Vict. c. 59, that a sum of 150*l.* out of the highway rates for the parish of Rustington should be paid by the appellant, the surveyor of highways of Rustington, towards the repair of the road.

On appeal to quarter sessions the order of justices was quashed, and, on appeal to the Queen's Bench Division, the order of quarter sessions was quashed.

June 17 and 19. *Cave, Q.C.*, and *Gore*, for the appellant.

Willoughby and *Lumley Smith*, for the respondents.

The arguments and cases sufficiently appear in the judgment of the Court.

Cur. adv. vult.

June 23. BRAMWELL, L.J. I think this judgment should be affirmed. The question really is, what are the rights of the public under a statute passed for the benefit of the public, and not for the benefit of trustees of turnpike roads. The public are interested in having this road repaired, and my opinion is that which is expressed by Blackburn, J., in *Trustees of Sunk Island Turnpike Road* v. *Patrington*. (1) He says: "A turnpike road is a highway, and therefore by common law the parish were, and I apprehend still are, liable to repair it, and liable to an indictment if they neglect to do so. Statute duty had been imposed by several statutes, with remedies to enforce it; but at the time of the passing of the statute in question those statutes had been repealed and those remedies were gone. It being found that these were turnpike roads, being highways, the funds of which failed, and the public suffered in consequence of their being out of repair, that Act was passed. It is an enactment for the benefit of the public, which, inasmuch as turnpike trusts are apt to be insolvent, gives a new remedy by enabling the trustees to go before justices of the peace to obtain funds from the highway rate to keep them in repair." In my opinion the road in question is a

(1) 1 B. & S. at p. 756.

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turnpike road within 4 & 5 Vict. c. 59; and if an indictment would lie against the parish in which it is when it is out of repair, then it comes within the statute, so that the justices can order a payment out of the rate; and the converse is true, that where a payment could be ordered by the justices out of the highway rate, an indictment would lie. The remedy by indictment against the parish is an indirect mode of obtaining redress. The parish is prosecuted in point of form for not keeping the highway in repair. What practically happens is, that a nominal fine is imposed if the parish should put it into repair. I should think a very much better arrangement would be, as was thought by the legislature, that where there is a fund in the hands of trustees for that purpose, although insufficient, instead of the parish being indicted, it should pay a sum of money to be added to the fund, so that those intrusted with the repair might put the road into repair. There is this obvious consideration, if the roads wanted repair to the amount of 500*l.*, and the trustees had 400*l.*, it was much better the parish should pay 100*l.* than be proceeded against by indictment. If an indictment would lie, it is within 4 & 5 Vict. c. 59, that a contribution should be enforced under the Act.

The question then is, is it a turnpike road? It seems to me that a road is within 4 & 5 Vict. c. 59, when it is made under the authority of an Act of Parliament, for I do not know any authority except an Act of Parliament which can enforce it to be made. I think that a road is a turnpike road within 4 & 5 Vict. c. 59, when it is made under the authority of an Act of Parliament with that intention, and in contemplation that it should be repaired by tolls to be taken at a turnpike. The words of 4 & 5 Vict. c. 59, are "that it shall be lawful for the justices, at any special sessions for the highways holden after the passing of this Act, upon information exhibited before them by the clerk or treasurer of any turnpike trust, that the funds of the said trust are insufficient for the repairs of the turnpike roads within any parish." I think that shews the legislature intended, as I say, a road made under the authority of an Act of Parliament by trustees, which it was contemplated would be maintained and repaired by the trustees out of tolls taken by the turnpike trustees. Suppose that trustees

could not have put a toll gate up on that bit of road, they could have got no other funds; therefore I think that bit of road so made would have been a turnpike road within the parish, although there was no turnpike upon it or in any way connected with it. It seems to me the legislature, as I say, meant any road which it was contemplated should be repaired by tolls taken at a turnpike. I am not at all sure we need go as far as that in this case, but it seems to me that is the definition. As I say, I think, if this bit only had been made, it would have been within 4 & 5 Vict. c. 59. It was said that there was no statutory duty. There are two answers to that: first there is some statutory duty, which the trustees were entitled to enforce; and in the next place, the enacting part of the statute is not limited. The enacting part is not limited in any way, and it may very well be it is more extensive than the recital might have made one think it would be in the first instance. After all, I cannot help thinking, when the legislature was legislating upon the subject, they thought it would be a much better arrangement for the parties and for the public that this should be done than that there should be an indictment. Then, next, it was said this was a private speculation, and that a ferry was connected with the road. If it is a turnpike road, it is none the less so because there is a ferry. There is great authority, apart from reasoning, upon that.

Then it was said this was an enterprise for profit, and that a very large dividend might have been got out of the road. Certainly it would be very singular if they could divide their funds and leave the road out of repair, and then get the parish to contribute to the maintenance of it. Of course that would be a breach of trust, and they would not be permitted to do it; but the fact, that there was a possible gain out of it, does not make it the less a turnpike road.

Then another argument against the respondents was this, the general Turnpike Clauses Act does not apply where the trust is a perpetual one; but this objection cannot prevail.

Then there was another taken on behalf of the appellant's objection. This is not a public road, because the trustees have no right to take tolls till they have made the entire road, and therefore the case is in this difficulty; inasmuch as the trustees have

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not made the whole of the road that they were to make and have no right to take tolls, but have taken tolls, that is to say, they have not permitted people to go along a part of it unless they paid tolls, the case is not within the statute, they not having made the whole road but having taken the tolls; and there is no dedication to the public, because they have not allowed people to pass except on the term of their paying toll. And it was said there was nothing in the Act of Parliament which said the road when made should be a public road. I think one of several answers to the argument is this, in the first place I think I ought to say it is impossible to read that statute without saying that when the roads were made the public were to have the use of them, and to my mind it is impossible to read the statute without saying that, if this bit of road had been made first and before the others had been made, it would have been a road as soon as it was made and the public could go along it. I think if this bit of road had been made first and had been in a fit state for use, the trustees could not have said to anybody, "You shall not go along there except upon our terms, and our terms are these, inasmuch as we have not made the whole of the road we are entitled to ask what toll we like, and we charge double the toll." It was pointed out, and the argument was forcible, that if that were so this would follow, they might make a choice bit of road upon which they could put a toll-house, they might take the toll there and not make the rest of the road, and so they would receive a large profit from the toll-house although a very small portion of the road had been made. That is a legitimate argument, though in this case it turned out I think nine-tenths or more of the road had been made. However, it is a legitimate argument, and is rather a striking thing.

Then it was said the trustees cannot be compelled by mandamus and other proceedings to make this road, and that was decided in the case of *York and North Midland Ry. Co.* v. *Reg.* (1) Whether that decision would govern a case like the present, it is not necessary to determine. Probably there is this distinction, in that case it was merely a thing for the private benefit, and there was a pro ratâ toll imposed, whereas that is not so here. It may be

(1) 1 E. & B. 858; 22 L. J. (Q.B.) 225

what the legislature would have done would have been this, they would have confided to the honest proper feeling of the trustees and supposed they would make the road if they had the means, and another thing, the legislature may have supposed they would make all the road, because the making of all the road would be for their benefit, although they could only get paid a toll on one part of the road. But let these things be decided as they may, whether they can be compelled to make the road if they have funds, or whether they cannot, as I have said, it seems to me clear upon the Act of Parliament that when the roads were made the public had a right to use them subject to paying a toll when they went through that particular turnpike where the trustees had a right to take it, and that it was not a condition precedent to their being roads that the whole should be made, nor was it a condition precedent to the right of the trustees to take toll that they should make the whole of the road; and I think the difficulty suggested may be retorted upon the appellant in this way, that, if the argument is well founded, the trustees could at this moment insist upon any toll they thought fit to ask if that toll-gate was in existence. It seems to me therefore these are public roads and turnpike roads for reasons I have given.

Then it was said the case of *Rex* v. *Cumberworth* (1), followed by two others, shews that where a turnpike trust is to make a road, it must make the whole road, at all events before the parish, in which any part of it is, would be subject to an indictment for not repairing that part. In answer to that, it was said the judgments in the Court below in those cases are overruled by *York and North Midland Ry. Co.* v. *Reg.* (2) With great submission, I cannot see they are so overruled. What that case decided was that a railway company having power to make a line, had power, but no duty to do it, and could not be compelled by mandamus to do it. *Rex* v. *Cumberworth* (1) and the following cases had decided, not that the trustees of a turnpike road were compellable to make the whole of the road, but, as I understand that case, that they must do it before they get any rights under it. That is my interpretation of it. If *Rex* v. *Cumberworth* (1) did really decide that the trustees were compellable, I suppose to some extent,

(1) 3 B. & Ad. 108; 4 Ad. & E. 731. (2) 1 E. & B. 858; 22 L. J. (Q.B.) 225.

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except that a railway company may be subject to different considerations, it may be said *York and North Midland Ry. Co.* v. *Reg.* (1) did overrule *Rex* v. *Cumberworth.* (2) The interpretation of the case is that I do not think it did overrule it. At all events, if it did overrule *Rex* v. *Cumberworth* (2) to the extent of holding that the trustees were not compellable, yet it did not overrule *Rex* v. *Cumberworth* (2) upon the vital point in this case, which is, not whether the trustees can be compelled to complete the road or not, but whether if they have not completed it, an indictment would lie against the parish for non-repair. That was not overruled in *York and North Midland Ry. Co.* v. *Reg.* (1) Therefore, with all submission to the Queen's Bench Division, we must see for ourselves how far *Rex* v. *Cumberworth* (2) bears upon this case. In my judgment, with very great respect, it cannot be supported. I think the mistake that was made there, with great deference—it is not necessary to express one's high opinion of Lord Tenterden and the other learned judges who sat with him —but I think the great mistake there was in looking upon it as a case in which the merits or deserts of the trustees were concerned, and not the rights of the public. I cannot help thinking the judges were partially led into that by what is now admitted to be an erroneous consideration, namely, that a parish is not liable for the repair of a road until it has in some way or other adopted it. That certainly is not the law, and it is a very singular thing that *Rex* v. *Cumberworth* (2) should have been decided as it was, because it comes to this, any man at that time might have passed upon the parish the burden of repairing a highway by simply laying it open to the public, if the public used it, as no doubt they would. It seems to me that could not be truly so, when the trustees made it. Therefore, with great deference to the Queen's Bench, I do not agree with what they say about *Rex* v. *Cumberworth* (2), and with great deference also to those who decided *Rex* v. *Cumberworth* (2), I do not think that case was well decided. I think it was decided upon the two erroneous considerations I have mentioned. It seems to me, therefore, that this is, as I have said, the case of a turnpike road, that is to say, a road made under statutory authority by trustees, which the legislature contemplated

(1) 1 E. & B. 858; 22 L. J. (Q.B.) 225. (2) 3 B. & Ad. 108; 4 Ad. & E. 731.

would be maintained by tolls to be taken on a part of the road or roads which were to be made under that statutory power.

Then there is only one other observation I should like to make: if it were necessary to make a distinction between this case and *Rex* v. *Cumberworth* (1), I might rely upon a fact, similar to that which existed in *Roberts* v. *Roberts* (2), where the road was to be made from Llanrwst to a village, and from that village to Abergele. The Court there held there were two distinct roads, because the legislature contemplated they would be made at different times. I think that is quite as true here, because the roads made here are certainly three distinct roads, roads which do not join each other, roads which only communicate with each other by means of old existing roads, which would still be repairable by the parish and not by the trust.

Then these are to all intents and purposes three distinct roads, although part of one system. I think, therefore, this case is distinguished from *Rex* v. *Cumberworth*. (1) If we look to the true question, what are the rights of the public and what are its interests, I am of opinion this is a turnpike road within the Act of Parliament, and that the order for contribution was rightly made.

BRETT, L.J. I am of opinion that the judgment of the Queen's Bench Division ought to be affirmed. The question is whether the road from Littlehampton to Rustington is a turnpike road within the meaning of 4 & 5 Vict. c. 59? If it is, the justices had authority to make the order they have made.

It is argued that it is not a turnpike road for three reasons. First, it is said that even if the whole system of roads had been made, and it was clear that tolls might be legally taken in respect of all the roads, including this particular road, yet that the road would not be within the enactment, because the trust being for an unlimited time the road would be taken out of the General Turnpike Acts by s. 90 of 4 Geo. 4, c. 95. But it was decided in the *Northam Bridge and Roads Co.* v. *London and Southampton Ry. Co.* (3) that the words "turnpike road" must not have a

(1) 3 B. & Ad. 108; 4 Ad. & E. 731.
(2) 3 B. & S. 183.
(3) 6 M. & W. 428.

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limited application. If it is a highway on which a turnpike is lawfully erected, and upon which tolls can be legally taken, then the road is a turnpike road. As all turnpike Acts, including the present, are passed for the benefit of the public, I think that construction of "turnpike road" is correct. It is true that by 5 Geo. 4, c. xciv., a benefit is given to the promoters and subscribers of the undertaking, but that benefit is subservient to the benefit conferred on the public. If that Act be properly carried out, the subscribers can get no benefit from the tolls until the benefit and advantage to the public is first fully secured. I think that this road is a highway on which tolls can be taken. Secondly, it was said that this road, if no tolls were taken on it, would not be a highway repairable by the parish, because it is one of a system of roads, or a part of a larger road, and that the whole system of roads or the whole of the road was not completed by the trustees. For that proposition the cases of *Rex* v. *Cumberworth* (1) and *Rex* v. *Edge Lane* (2) were cited. Those cases were decided upon the authority of the earlier case of *Rex* v. *Cumberworth* (1), and if that case cannot be supported neither can the other two which were decided in the same Court, and merely follow upon the earlier authority. In the case of *Rex* v. *Cumberworth* (1) first decided, three propositions were laid down, although it may be only one was necessary for the decision of the case. A system of roads having to be made under a private Act of Parliament, it was said the trustees were bound to make all the roads, and if therefore the whole system were not completed they would be compelled to complete it. That was one proposition. It was next said that although a road was used by the public, yet it was not a road repairable by the parish unless the parish acquiesced in the use of the road by the public. Lastly, it was said that where a system of roads were to be made by trustees under a private Act, and any one of the roads, or part of one of the roads, was made, even if that part was used by the public, that it would not be a highway repairable by the parish unless the whole system of roads was made. Those, in effect, were the three propositions to be deduced from the earlier case of *Rex* v. *Cumberworth*. (1) Soon after that decision the proposition, that in order to charge a

(1) 3 B. & Ad. 108; 4 Ad. & E. 731. (2) 4 Ad. & E. 723.

parish with the repair of a highway they must have adopted the highway, was overruled in the case of *Rex* v. *Leake*. (1) Next the proposition that trustees could be compelled to finish a road which they had obtained a power to make was also overruled in the case of *York and North Midland Ry. Co.* v. *Reg.* (2) The third proposition whenever it has been mentioned has always been excepted to, but it was followed because the point has only been raised in Courts other than a Court of Appeal. The question has now come before us, and the objection which has always been made as to the third point must prevail, and *Rex* v. *Cumberworth* (3) ought to be entirely overruled. The counsel for the appellant put an extreme case: he said if only a small part of a road was made and the greater part was not made, it would be hard to them that the burden of repairing that small part of road should fall on the parish when they could derive little or no benefit from so small a part of a larger scheme, but the learned counsel was obliged to admit that an extreme case from an opposite view would also be hard, that where eleven and a half miles of a road are made and half a mile not made, and the public for a number of years have used the portion that has been made, the larger part was not to be repaired by the parish, because the half mile of road was not made.

Then it was said that the trustees could not dedicate to the public a part of a road, that is, the part of the road that was made and thrown open for their use; but if the trustees are not owners of the land taken by compulsion and do not finish all the roads they ought to give up the property. That cannot be: the trustees are as capable of dedicating the part of the road as any private owner who is possessed of land. They are the owners of the part of the road that is thrown open to the public, and the public have the option of taking or rejecting the road; and the theory of making a road a public highway repairable by the parish is this, that the public have seen that the road which is offered to them is useful to them; if it is not useful to the public, they would not take it. It is by their general assent and user of the road that it is proved to be useful to the public, and then there

(1) 5 B. & Ad. 469. (2) 1 E. & B. 858; 22 L. J. (Q.B.) 225.
(3) 3 B. & Ad. 108; 4 Ad. & E. 731.

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is no reason why the parish should not repair it. It seems to me, therefore, that *Rex* v. *Cumberworth* (1) ought to be overruled, and that this piece of road was a public highway repairable by the parish, although the rest of the road was not completed, because the public have used the road.

But then it is said if this is a highway it is not a turnpike road, because no toll can be legally taken upon any part of the road until the whole road is finished. It does not seem to me that as to this point one is called upon to enter into a discussion as to whether *Rex* v. *Cumberworth* (1) was rightly decided or not. The whole question must be whether, upon the particular Act, it is a condition precedent to the right to take tolls upon a part of the road that the whole of the road should be finished. I think the rule in construing any instrument, either an Act of Parliament or any other document, is that it is not to be held that there is a condition precedent unless it is clearly expressed, or unless such is the clear inference to be drawn from the language which is used, and the ground upon which I say that it is not a condition precedent in this case is that there seems to me to be no such enactment in this Act of Parliament, and there is nothing from which such an inference can reasonably or necessarily be drawn, that it is a condition precedent to take tolls, say, upon all the road except a mile, supposing all the road had been finished except a mile, or upon all the roads except a by-road until the one small piece of road or the one by-road had been made, and if it would not be a condition precedent in that case, it is not a condition precedent in the present case. Therefore it seems to me this would be a public highway if it was not a turnpike road; that it is a turnpike road, that is to say, that it is a road which otherwise would be a highway, but upon which tolls are lawfully taken. It is therefore within the definition which is given in the case of the *Company of Proprietors of the Northam Bridge and Roads* v. *London and Southampton Ry. Co.* (2) That definition is, I think, a right one. I therefore think the judgment of the Queen's Bench Division ought to be affirmed.

COTTON, L.J. The question we have to consider upon this

(1) 3 B. & Ad. 108; 4 Ad. & E. 731.

(2) 6 M. & W. 428.

appeal is, whether the justices had power to make an order under 4 & 5 Vict. c. 59, appropriating a part of the highway rate towards the repair of a certain portion of a road made under a private Act. I think that where there are certain persons charged with the duty of keeping a road in repair, and they have funds for the purpose, then the parish are not to repair the road, but they are liable to be called upon by the justices to supplement the funds in the hands of the parties who had charge of the road to make good any deficiency. That is a much more convenient course than to allow an indictment to be preferred against the parish.

The words of the recital in 4 & 5 Vict. c. 59, are not restrictive, and when we find in the enactment itself words capable of a reasonable and fair interpretation, we must not limit the enactment by reference to the recital. I think the Act of Parliament applies to turnpike roads made after the passing of the Act, and I am also of opinion that even as regards old roads, if they come within the fair meaning of the words used in the enacting part, we cannot deprive the roads of the benefit of the statute by referring to the recital. I use advisedly the words "roads of the benefit of the Act," because it is not the trustees who are seeking to have the benefit of this Act for their own purposes. It is simply out of regard to the public interest that this application is made, and although, no doubt, the question of the private interest these trustees had may fairly be taken into consideration in seeing whether or not this can be considered as a highway, yet it is not their interest in any way which is to be regarded; it is the interest of the public, who are entitled to have this road kept in a particular manner, if it is a highway and if it is a turnpike road.

Now, is it a highway and is it a turnpike road? It was argued upon both those points that it was not so, because the means of communication established by this private Act were to be considered as a private speculation, and if that had been so it would have been a strong argument to prevent it being considered a highway or a turnpike road; but I cannot consider that is the real effect of this Act of Parliament. In my opinion it was for the public benefit that these roads and this ferry should be made, and although certain persons contributed certain sums of money to enable both these objects to be carried out, the roads have to be

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thrown open to the public, and the public would have a right to use these subject only to a certain rate of tolls. It was to become a public highway: a road and highway for the benefit of the public. We must look to the whole purport of the Act of Parliament, and then say whether this was intended to be anything in the nature of a private speculation to benefit certain promoters of the undertaking or whether it was not. In my opinion the Act was passed to establish a highway for the benefit of the public, part of that highway being the ferry which was to be kept in order, and for which proper boats were to be supplied. That being so, the fact that the surplus of the tolls was to go to the trustees does not make it a private speculation, so as to prevent its becoming a highway if otherwise a turnpike road. But is it a turnpike road? And I mention that before I deal with an argument which equally applies to a turnpike road or a highway. To be a turnpike road it must be part of a road in respect of which tolls shall be legally taken. It is perfectly obvious that does not mean that the particular bit of road must be a road for the use of which, by itself, tolls can be taken; it must be part of a system for the use of which tolls are authorized to be taken. It is said here that tolls could not lawfully be taken, and that this could not be considered a highway, for the reason that the whole of the system of the roads, or the whole of the roads which by this Act of Parliament it was contemplated would be made, had not been made, and that was said to be founded upon certain cases which were referred to. Of course in deciding that question, irrespective of any authority upon the point, we must look to the Act, and must see whether, in the contemplation of the framers of the Act, it was a condition precedent, either to its being a highway or to the right of the trustees to receive any tolls, that the whole of this system should be completed; that the whole of the roads were to form a public highway, or roads in respect of which the trustees could claim tolls. It is clear upon the Act, as regards the ferry, tolls could be taken as soon as the ferry was put in proper order and proper boats were provided; but as regards the roads, when we look at what these roads were, I think we cannot but come to the conclusion that, neither as regards the highway nor as regards the right to take the tolls, could it be a condition precedent

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that all the roads should be completed. Having regard to the fact that there is a road which is separated by the ferry from another portion of the roads contemplated by the Act, and that that forms the very portion which, it is said, is not made; if it had been intended that no toll should be taken until the whole of the other means of communication were made throughout, I should have expected to find that intention clearly expressed, and that it would not have been left to conjecture whether, if one road on the west side of the river had been completed, though a small portion on the east had not, there would have been a right to take tolls. Whether the trustees could have taken tolls when that particular bit on the west side was completed, it is unnecessary to give an opinion upon, but having regard to the divisions between the roads, the fact that they have a right to put up a toll-house and to take tolls is a strong argument that the completion of all the roads was not a condition precedent. Then s. 72 contemplated that part of the work would not be finished within ten years, and then the powers given by the Act cease. It is unnecessary, in my opinion, to go further, but I think we can see, looking to the Act, and to the fact that there is a requisite division by the river of several of the roads, and that the roads are broken up, that the true construction of the Act is that neither as regards the liability of the public to repair it as a highway nor the right to take tolls, can it be considered as a condition precedent that the entire system down to the last 300 yards should be completed before any toll is taken. It is said that is contrary to the decision in *Rex* v. *Cumberworth* (1), but, as has been pointed out by Brett, L.J., that case has been followed by Courts which could not overrule it. This case coming before a Court of Appeal, I say that, although *Rex* v. *Cumberworth* (1) does lay down as a general proposition that there shall be no liability to repair a road under a somewhat similar Act of Parliament unless the entirety is made, that there shall be no liability to pay tolls unless the entirety is completed, that, in my opinion, is no longer law, and ought no longer to be considered as applicable to these cases.

Then there is another point which Bramwell, L.J., mentioned in his judgment, and which I in no way dissent from. Even if the

(1) 3 B. & Ad. 108; 4 Ad. & E. 731.

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tolls could not be taken in consequence of the entirety of this road not being finished, I think it would be a very reasonable construction of 4 & 5 Vict. c. 59, to hold that that Act still applied to this road as a turnpike road, and that the justices could order part of the highway rates to be applied to its repair, instead of allowing the parties to proceed by indictment against the parish. In this case there is nothing to shew that it is a condition precedent to the tolls being taken or to its being a highway, that the entirety should be completed; on the contrary, I think there is an intention in the Act of Parliament that as soon as a portion of this road shall be open to the public it shall become a highway, and that there shall be a right to the tolls, at least, when those communications on the west side of the river are made.

Judgment affirmed.

Solicitors for appellant: *Palmer, Bull, & Fry.*

Solicitors for respondents: *Senior, Attree, & Johnson, for French, Hardwicke, & Harvie, Bognor.*

July 30.

THE QUEEN *v.* THE JUSTICES OF HUNTINGDON.

Justices of Peace—Disqualification to hear a Complaint—Interest in Subject-Matter—Dogs Act, 1871, 34 & 35 *Vict.* c. 56.

Three justices who were members of the town-council of a borough and as such had taken an active part in the making of an order under the Dogs Act, 1871 (34 & 35 Vict. c. 56), sat to hear a complaint of non-observance of the order:—

Held, that they had no such interest in the subject-matter as to oust their jurisdiction.

In the absence of any special provision for the mode of publication of the order, it is enough to shew that it has been posted up in five or six places within the borough.

ON the 5th instant, W. B. Alexander was summoned before the justices of Huntingdon charged with unlawfully failing to comply with an order made on the 24th of May last by the town-council of the borough (being the local authority in that behalf) under the provisions of the Dogs Act, 1871 (1), whereby it was ordered

(1) 34 & 35 Vict. c. 56, the 3rd section of which enacts that "the local authority may, if a mad dog or a dog suspected of being mad is found within their jurisdiction, make, and when made vary or revoke, an order placing such

that all dogs within the borough (not being under the control of any person) shall be securely muzzled with a wire muzzle.

It was proved by a police-constable that on the day in question he saw the accused walking in the borough of Northampton with his dog, which was running about unmuzzled; and that he (the witness) had seen five or six copies of the notice posted about the town.

It was objected on the part of the accused, that, inasmuch as all the magistrates present at the hearing were members of the town-council, and had taken an active part in the issuing of the notice, it was not competent to them to sit as justices to hear the case,—citing *Reg.* v. *Meyer*. (1) It was further objected that there was no sufficient proof of the due publication of the notice; and that, as the owner was with him, the dog could not be said to be wandering about without being under control.

The objections were overruled, and the accused convicted.

Dunlop Hill, moved for a certiorari to bring up the conviction to be quashed. *Reg.* v. *Meyer* (1) is a distinct authority to shew that one who has a real interest, however small, in the subject-matter of the inquiry is disqualified to sit as a magistrate on the hearing, even though he take no part in the discussion. The justices present on this occasion being members of the town-council, and having admittedly taken an active part in the issuing of the notice in question, clearly had such an interest in enforcing its observance as to disqualify them from taking part in a conviction under it.

[POLLOCK, B. According to your argument, a member of the representative house of parliament never could sit to enforce penalties under a recent Act of Parliament.

DENMAN, J. In *Reg.* v. *Meyer* (1), Meyer, the chairman of the Enfield board, was practically and really a party to the proceedings.]

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restrictions as they think expedient on all dogs not being under the control of any person, during such period as may be prescribed in such order, throughout the whole of their jurisdiction or such part thereof as may be prescribed in such order. Due notice of such order shall be published at the expense of the local rate."

(1) 1 Q. B. D. 173.

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Then, although the statute provides no specific mode of publication, it cannot be enough to shew that there has been a casual publication by sticking up a few copies of the notice in some possibly obscure streets in the borough. Nor can a dog be properly said to be wandering "without being under the control of any person," whilst walking with his master. (1)

DENMAN, J. I am of opinion that there is no pretence for this application. It is said, in the first place, that, because the three justices before whom the complaint was heard were members of the town-council of Huntingdon, and as such took part, under the provisions of the Act, in the issuing of the order for disobedience of which the accused was summoned, they had such an interest in the subject-matter as to deprive them of jurisdiction to hear it. I cannot, however, see that, because they were members of the town-council, they are not proper persons to hear or not likely persons to give an impartial decision as to whether or not the order has been disobeyed. Then, as to the publication, it is not necessary that there should be notice to every individual in the borough; and it is quite consistent with the evidence and with the defendant's affidavit that proper notice of the order was given. Then it is said that the dog was not out of his master's control. That, however, is purely a question of fact, to raise which there should have been a case: but this does not appear to have been asked for.

POLLOCK, B., concurred.

Motion refused.

Solicitor for applicant: *E. Kimber.*

(1) The defendant's affidavit stated that he had received no notice of the order, and that, though loose, the dog came to him when he whistled.

[IN THE COURT OF APPEAL.]

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May 30.

THE QUEEN *v.* THE BISHOP OF OXFORD.

Ecclesiastical Law—Church Discipline Act (3 & 4 *Vict. c.* 86), *s.* 3—"*It shall be lawful*"—*Statute, Construction of*—*Words importing obligation*—*Discretion of Bishop to refuse to issue Commission on Complaint of Ecclesiastical Offence—Public Worship Regulation Act*, 1874 (37 & 38 *Vict. c.* 85) *Statute, Authority for Interpretation of—Debate in House of Lords—Speech of Lord Chancellor.*

When a complaint is made under the Church Discipline Act, s. 3, to a bishop that within his diocese an offence against the laws ecclesiastical has been committed by a clerk in holy orders, the bishop has a discretion whether he will issue a commission to inquire into the truth of the complaint, and no mandamus will lie to compel him to do so.

Decision of the Queen's Bench Division, ante, p. 245, reversed.

During the argument of a case before the Court of Appeal counsel proposed to cite as an authority for the interpretation of the Church Discipline Act, s. 3, the opinion of the Lord Chancellor as to its construction, contained in a speech delivered by him during a debate in the House of Lords upon the third reading of the Public Worship Regulation Act, 1874:—

Held, by Bramwell and Baggallay, L.JJ., Thesiger, L.J., doubting, that the speech of the Lord Chancellor might be lawfully read for that purpose by counsel during his argument.

Appeals by the Bishop of Oxford and the Rev. T. T. Carter, against an order of the Queen's Bench Division, that a writ of mandamus should issue, directed to the Bishop of Oxford, commanding him, pursuant to the provisions of 3 & 4 Vict. c. 86, intituled "An Act for better enforcing Church Discipline," either to issue a commission under his hand and seal, for the purpose of making inquiry as to the grounds of the charges preferred by F. G. Julius against the Rev. T. T. Carter, or to send the case by letters of request to the Court of Appeal of the province, to be there heard and determined according to the law and practice of such court. (1)

The following facts appeared from the affidavits of the prosecutor, F. G. Julius, and other persons sworn in support of the application to the Queen's Bench Division for the order for the mandamus.

(1) Ante, p. 245.

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The Rev. T. T. Carter was rector of the parish of Clewer, in the county of Berks, and in the diocese of Oxford, and the prosecutor was resident in that parish. Upon certain days in 1877 and 1878, the Rev. T. T. Carter himself committed and allowed his curate or assistant minister to commit unlawful acts during the administration of the Holy Communion: these acts may be briefly described as follows: first, wearing unlawful ecclesiastical vestments; secondly, mixing water with the wine used and administered at the Lord's Supper; thirdly, whilst breaking the bread and taking the cup into his hands during the prayer of consecration, standing at the west side of the Communion table with his back to the people in such a manner as to prevent the communicants from seeing him break the bread and take the cup in his hand; fourthly, whilst saying the prayer of consecration, bowing and bending down his head and body towards or over the Communion table; fifthly, making the sign of the cross towards the congregation and not towards himself at the time of saying the Absolution and also the Benediction, and further making the sign of the cross while holding the cup and the bread before delivering the same to each communicant; sixthly, elevating during the prayer of consecration the paten or bread and the cup in an unauthorized manner. Further, the Rev. T. T. Carter permitted lighted candles to be burned on the Communion table, or on a ledge immediately over it, during the celebration of the Holy Communion, when the same were unnecessary for the purpose of giving light; and upon one occasion the hymn or prayer known as the "Agnus" was sung immediately after the prayer of consecration in the Communion Service. Upon the 11th of July, 1878, the prosecutor wrote to the Bishop of Oxford, complaining of the Rev. T. T. Carter's unlawful acts, and alleging that he was thereby prevented from attending divine service at the parish church, and requiring the bishop either to issue a commission under the Church Discipline Act (3 & 4 Vict. c. 86), or to send the case by letters of request to the Court of Appeal of the province. Some correspondence ensued between the bishop and the proctors to the prosecutor, and at last, on the 10th of August, 1878, the bishop wrote as follows: "In reply to your letter I can only say that I have not yet been able to satisfy myself as to the best way of dealing with

the complaint, to which it refers. The repeated occurrence of failures during the last few years in the conduct of legal proceedings of this kind has had a tendency to cover all persons concerned in them with ridicule, and to bring on the Church itself some contempt, which I would not willingly increase. In this case I have further to consider that the complaint is made in opposition to the strongly expressed wish of the great majority of the parishioners, and that the person complained of is a clergyman in advanced years, generally respected, and even beloved by those who know him. I mention these considerations, not as affording any answer to your client's complaint, but as reasons, which impose upon me the duty of taking unusual care in deciding on the course, which I ought to adopt." Further correspondence ensued between the bishop and the proctors to the prosecutor: the latter asked for a definite reply to the prosecutor's application of the 11th of July, that proceedings might be taken against Mr. Carter; but this in effect the bishop declined to give.

The affidavit of the prosecutor was dated the 28th of December, 1878, and stated that he had left England temporarily on the 7th of November, 1878, for the purpose of travelling abroad, and was sworn at her Majesty's Consular Court at Cairo.

April 23, 24, 25, 26, 28, 29, 30. *C. S. C. Bowen* (*M. J. Muir Mackenzie*, with him), for the Bishop of Oxford. It is admitted that the Rev. T. T. Carter has committed many ecclesiastical offences within the diocese of Oxford, and that if the bishop had thought fit "of his own mere motion" to issue a commission under the Church Discipline Act (3 & 4 Vict. c. 86), ss. 3, 4, the commissioners might well have reported that there was sufficient primâ facie ground for instituting further proceedings against him; but the bishop for the reasons stated by him is of opinion that it is inexpedient to prosecute Mr. Carter; and it is now contended that under the statute already mentioned a discretion is vested in the bishop as pastor of his diocese to determine whether he will cause proceedings to be taken, for he has the best opportunities of judging what course is most beneficial to the interests of the Established Church.

It is proposed on behalf of the bishop, in the first instance,

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to review the state of ecclesiastical law and the procedure in the Ecclesiastical Courts, as they existed before the passing of the Church Discipline Act. As is stated in the judgment of the Queen's Bench Division delivered in the present case (1), two conflicting theories have been advanced as to the power to institute proceedings in the Ecclesiastical Courts; the one, that a clerk in holy orders charged with having committed an ecclesiastical offence might be prosecuted by any person of ability to pay costs, the leave of the Court to promote the office of judge being granted as a matter of right; the other, that the Court might refuse permission to commence the suit. It is submitted that the latter is the true theory. The object of an ecclesiastical suit was not to redress or punish a temporal wrong, but was pro salute animæ, that is, to correct and reform spiritually the offender: *Caudrey's Case,* Of the King's Ecclesiastical Law (2); 2 Ins. 622 (Articuli Cleri, ch. 6); 2 Phillimore's Eccl. Law, part iv. ch. ii. pp. 1087, 1088; and this object could not be attained if the bishop, or at least the judge of this court, were compellable to proceed against an offender, whose conduct might in a moral point of view be deserving of very little, if any, blame. The court in which the proceedings were taken was always the bishop's court, in which he himself originally sat, but his judicial authority was afterwards delegated to his vicar-general or chancellor: *Ex parte Medwin.* (3) A right of appeal always existed to the archbishop, and the latter also claimed original authority to cite spiritual offenders before him. Proceedings always began by citation, even in cases of appeal, and the procedure was based upon the canon law. The prosecution of offenders might be in three ways: by accusation, by inquisition, or by denunciation: accusation might be brought by any person not under certain disabilities; but the accuser was compelled to bind himself by writing to undergo lex talionis if he failed to make out his charge: 2 Van Espen's Jus Ecclesiasticum Universum, pars. iii. tit. viii. c. i. p. 315 (ed. 1753); and this circumstance caused accusation to be little used: inquisition was an investigation undertaken ex officio by a judge without any accuser standing forward; and denunciation was when information was

(1) Ante, p. 265. (2) 5 Rep. 6a.
(3) 1 E. & B. 609; 22 L. J. (Q.B.) 169.

given of a concealed crime to the judge without any of the formality of an accusation. These three modes of procedure are commented upon and explained in Reeve's History of the English Law (2nd ed. 1787), vol. iv. ch. xxiv. p. 35; (Finlason's ed. 1869), vol. iii. ch. xxv. p. 64. About the time of the Reformation complaints were made as to the procedure of the Ecclesiastical Courts: Reeve's History of the English Law (2nd ed. 1787), vol. iv. ch. xxx. p. 398; (Finlason's ed. 1869), vol. iv. ch. xxx. p. 414; and the legislature attempted to remedy some of the more pressing evils. One of the first statutes as to ecclesiastical suits was 1 Hen. 7, c. 4, whereby archbishops and bishops were empowered to commit to prison priests, clerks, and religious men "convicted afore them by examination and other lawful proof, requisite by the law of the Church," of incontinency. This statute was finally repealed by the Church Discipline Act. A more important statute, as illustrating the exemption claimed by the clergy from the jurisdiction of the temporal Courts, was the Statute of Citations, 23 Hen. 8, c. 9. The only remedy for a wrong decision in a bishop's court was by appeal to the archbishop; no redress could be obtained at the common law; and the archbishop even claimed jurisdiction to require "bishops to proceed against particular persons in their dioceses, or shew cause why himself should not proceed:" 3 Burn's Eccl. Law, tit. [Practice—Citation], 9th ed. p. 255, citing 2 Gibson's Codex, tit. 44, ch. ii. p. 1007, note, 2nd ed.; but the archbishop's power to cite before himself, except in appeals and a few other cases, was restrained by the Statute of Citations; 4 Ins. ch. lxxiv. p. 337; although even after that statute the Court of Arches claimed jurisdiction to hear complaints against the judges of other Ecclesiastical Courts for denying or delaying justice: Conset's Eccl. Prac. p. i. ch. ii. s. 1, p. 6. By 24 Hen. 8, c. 12, appeals to the See of Rome were restrained, and an ultimate appeal to the archbishops from inferior Ecclesiastical Courts was given: ss. 5, 6, 7, 8; and by 25 Hen. 8, c. 19, s. 4, an appeal was given from the archbishop to the King in Chancery. Notwithstanding the last-named statute it is clear that the general policy of the legislature was to exempt the Ecclesiastical Courts from interference by the common law courts; and the rule observed in modern times is that whilst the bishops

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keep within their jurisdiction, no prohibition or other procedure lies against them: *Ex parte Rose.* (1)

Before proceeding to the question whether the bishop, or at least his judge, had a discretion in allowing the institution of proceedings, it may be as well to point out that such a discretion is only analogous to the discretion of the Attorney General as to entering a nolle prosequi (2) upon an indictment before judgment, or of the Crown to pardon at any time after the commission of a crime. Mr. Carter might, under 2 & 3 Edw. 6, c. i. ss. 4, 5, and 1 Eliz. c. 2, ss. 4, 5, 6, have been indicted in a temporal Court for the ecclesiastical offences which he has committed; but the proceedings upon the indictment could have been stayed either by the Attorney General or by the Crown, and in neither case could any Court have interfered with the discretionary power which had been exercised. As to the existence of the discretion, it is plain that at the time of the Reformation the legislature intended that the bishop should possess it; thus, by 13 Eliz. c. 12, it was for the bishop, or, at least, the Queen's Commissioners in causes ecclesiastical, to "convent" before them and deprive an ecclesiastic maintaining any doctrine contrary to the articles. From about the time of the Reformation the mode of commencing proceedings was by promoting the office of the judge. In Clarke's Praxis, tit. 309, p. 406 (2nd ed. 1684), which appears to have been written in 1596, the three modes of procedure, "inquisition," "accusation," and "denunciation," are treated of, although it may be that "accusation" bears a somewhat different meaning; and similar passages are contained in Conset's Ecclesiastical Prac. part 7, p. 379 (3rd ed. 1708); but the ex officio oath, which had been an important part of ecclesiastical procedure, was abolished by 13 Car. 2, st. 1, ch. 12 (3); and in Ayliffe's Parergon, p. 26 (1734) "accusation" is spoken of as obsolete. The counsel for the prosecutor may rely upon 1 Oughton's Ordo Judiciorum, tit. 150, p. 225, but the very phrase, "judicis officium implorare" implies that the judge had a discretion; and it is plain, upon referring to Ayliffe's Parergon, tit. "Of the Office of the Judge,"

(1) 18 Q. B. 751; 21 L. J. (Q.B.) 339.

(2) See *Reg.* v. *Allen*, 1 B. & S. 850; 31 L. J. (M.C.) 129.

(3) See 3 Burn's Ecc. Law, tit. Oath, pp. 14, 15 (9th ed.).

pp. 395, that he had power to prevent the institution of proceedings; it is said (p. 398), "the judge's office accrues only to the judge, though he may sometimes lend it to the party upon humble request." In 3 Burn's Eccl. Law [Practice—Articles], p. 283, it is laid down that "where the office of judge is promoted, the whole transaction must be fairly and specifically stated, in order, first, that the judge may consider whether he ought to allow his office to be promoted, which the judge, perhaps, may refuse, if both parties are in pari delicto;" and a passage in 2 Phillimore's Eccl. Law, part iv. ch. viii. p. 1320, commenting upon the words "it shall be lawful" in 3 & 4 Vict. c. 86, s. 3, plainly implies that in the opinion of the author the ordinary had previously had a discretion as to the institution of a criminal suit. The cases bearing upon this point, if fairly considered, fully bear out the view put forward on behalf of the defendants. In *Argar* v. *Holdsworth* (1) decided in 1758, it was laid down that a "clergyman might be prosecuted by any one for neglect of his clerical duty;" but this merely meant that any person acting bonâ fide might obtain leave from the judge to promote his office; moreover, in that case the promoter complained of a wrong personal to himself, that is, a refusal to marry him. In *Duke of Portland* v. *Bingham* (2), decided in 1792, the Court observed "that the rule was clear that where the office of the judge is promoted by any private individual, a personal application should be made to the judge;" and in *Maidman* v. *Malpas* (3) this rule was acted upon by Sir W. Scott. In *Turner* v. *Meyers* (4), decided in 1804, it was said by the Court that "the criminal suit is open to every one, the civil suit to every one shewing an interest;" but by these words it was only intended to distinguish between criminal suits, in which any one having obtained the leave of the judge might prosecute, and civil suits, which could be maintained only by a person having a personal interest. In *Procurator-General* v. *Stone* (5) it was said by Sir W. Scott that the bishop had no power to refuse the process of the Court to any person desirous to avail himself of it; but this

(1) 2 Phill. Cases temp. Lee, 515.
(2) 1 Hagg. Cons. 209, n.
(3) 1 Hagg. Cons. 205, at p. 209.
(4) 1 Hagg. Cons. 415, n.
(5) 1 Hagg. Cons. 424, at p. 425.

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dictum was meant only to point out that the bishop could not personally intervene in causes before his judge. If leave to take proceedings was wrongfully refused by the Court, the proper course was to appeal to the Court of Delegates: *Pelling* v. *Whiston.* (1) It is true that in *Carr* v. *Marsh* (2) Sir John Nicoll seems to have thought that if an ecclesiastical offence were charged, the office of the judge might be promoted by any one of ability to pay costs; but this view of the ecclesiastical law is not at all consistent with the language of the same judge in the later case of *Lee* v. *Matthews* (3), where he plainly lays down that he had power to consider "whether he ought to allow his office to be promoted." And in *Sherwood* v. *Ray* (4), the last case upon the subject before the passing of the Church Discipline Act, it was laid down in broad terms in the Privy Council that in order to promote the office of judge in a criminal suit the authority and consent of the Court were required. This was a decision of the highest court of appeal in ecclesiastical matters, that the judge had a discretion whether he would allow a criminal suit to be prosecuted.

It is proposed in the second place to review the Church Discipline Act (3 & 4 Vict. c. 86), and to consider its terms. One object of the statute was to increase the direct influence of the bishop and to substitute his personal authority for the jurisdiction of his judge; but if the contention for the prosecution is correct, the procedure introduced by the statute may be put into operation against the will of the bishop; if it is compulsory upon him to issue a commission, the words, "it shall be lawful," in the 3rd section must bear two meanings in the same sentence; in the first branch they will mean "must," in the second "may;" this is a mode of interpretation which, it is submitted, ought not to be adopted. The section contains no limitation as to the person who may complain or as to the offence charged; any person, whether Churchman or Dissenter, or, as in the present case, a person travelling abroad, may complain to the bishop; and the offence alleged may be of the most trivial nature, such as a sermon containing erroneous views upon controverted subjects, like predestination, or

(1) Comyn, 199.
(2) 2 Phil. Ecc. Rep. 198, at p. 204.
(3) 3 Hagg. Ecc. 169, at p. 174.
(4) 1 Moo. P. C. 353, at p. 397.

such as the omission to read in full the exhortation to attend the administration of the Holy Communion, which is often not read at length: there is no provision rendering the complainant liable to the payment of costs, if the commissioners report that no further proceedings ought to be taken: these omissions from the statute shew that it was intended to give the bishop a discretion. It may be said that the discretion of the Queen's Bench Division as to granting or refusing writs of mandamus would prevent the infliction of any hardship upon the clergy; but it can hardly have been intended by the legislature that that court should exercise, not as matter of law but at its discretion, a control over the dealings of a bishop with his flock. If a bishop improperly declines to issue a commission, no doubt his decision ought to be overruled by a superior ecclesiastical authority, and an appeal against a wrongful refusal by him appears to be allowed by s. 19, which preserves to the archbishops the power of citing before them any clerk whom they might have cited pursuant to the Statute of Citations, 23 Hen. 8, c. 9; one of the instances, in which an archbishop had power to cite a clerk before him under that statute, was in the case of an appeal; and it may well be that the principle of *Pelling* v. *Whiston* (1) still applies, and that by way of appeal from the refusal of the bishop, the archbishop, at the instance of the party complaining, may cite the clerk before him to shew cause why the commission should not issue; and if a remedy exists by way of appeal to the archbishop, no mandamus will lie. The authorities decided upon 3 & 4 Vict. c. 86, s. 3, with one exception, support the contention that the bishop has a discretion. The earliest case, referring to s. 3, was *Head* v. *Sanders* (2), in which Lord Campbell, when delivering the judgment of the Privy Council, appears to have been of opinion that there were no means of compelling the bishop to issue the commission. At a subsequent date it was alleged that Archdeacon Denison had maintained and published erroneous doctrines concerning the Eucharist; the bishop of the diocese being patron of the preferment held by him, the archbishop, pursuant to the Church Discipline Act, s. 24, gave notice of his intention to issue a commission under s. 3; the archdeacon having applied to the

(1) Comyn, 199.

(2) 4 Moo. P. C. 186, at p. 196.

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Court of Queen's Bench for a prohibition, it was refused: *Ex parte Denison* (1); and the language of Lord Campbell, in delivering the judgment of the Court, plainly implied that a discretion was vested in the bishop as to issuing a commission. It is true that Dr. Lushington, sitting as assessor of the archbishop, seemed to think that the statute was compulsory, but this opinion can hardly be considered as counter-balancing the other authorities. The most important case is *Reg.* v. *Bishop of Chichester* (2), in which the Court of Queen's Bench refused to grant a mandamus compelling the bishop to issue a commission. Wightman, J., was of opinion that the bishop had an absolute discretion, and this, it is submitted, is the true view, and appears to have been adopted by Crompton, J., in *Re Newport Bridge.* (3) In *Martin* v. *Mackonochie* (4), Sir R. Phillimore assumed that *Reg.* v. *Bishop of Chichester* (2) established that the power of the bishop was discretionary. The subsequent cases of *Elphinstone* v. *Purchas* (5), *Ex parte Edwards* (6) and *Lee* v. *Fagg* (7), so far as they go, shew that the temporal Courts ought not to interfere with the proceedings of the bishop under the Church Discipline Act; the proper remedy for a denial of justice by him is by appeal. But, further, it is proposed to cite as an authoritative exposition of the Church Discipline Act, s. 3, some passages from the speech of Lord Cairns, L.C., upon the third reading of the Public Worship Regulation Bill in the House of Lords upon the 25th of June, 1874, reported in Hansard's Parliamentary Debates, vol. 220, cols. 394, 395, 396.

Dr. A. J. Stephens, Q.C., for the prosecutor, objected that a report of a debate in parliament was not receivable as an interpretation of a statute. The opinion of the Lord Chancellor could be of little value, as he had not heard the argument of counsel upon the subject.

C. S. C. Bowen, in continuation of his argument. It is admitted that the speech of the Lord Chancellor, so far as it related to the effect of the bill before the house, is inadmissible; but it is

(1) 4 E. & B. 292, at p. 313; 24 L. J. (Q.B.) 34, at p. 40. 1 Jur. N.S. 517

(2) 2 E. & E. 209; 29 L. J. (Q.B.) 23. 6 Jur. N.S. 120

(3) 2 E. & E. 377; 29 L. J. (M.C.) 52. 6 Jur. N.S. 97.

(4) Law Rep. 2 A. & E. 116, at p. 123.

(5) Law Rep. 3 P. C. 245, at p. 257.

(6) Law Rep. 9 Ch. 138.

(7) Law Rep. 6 P. C. 38.

admissible as to the Church Discipline Act, for it is a statement of what the law then was by the highest judicial functionary in the land; when the House of Lords pronounces judgment upon an appeal in a suit, the proceeding is in theory a debate.

[BRAMWELL, L.J. In *M'Naghten's Case* (1), the opinions of the judges were delivered to the House of Lords, although the questions put to them had not been argued by counsel; we will hear the passages from the Lord Chancellor's speech relating to the Church Discipline Act.]

The opinion of the Lord Chancellor was clear that that statute conferred a discretion upon the bishop as to issuing a commission under s. 3.

It is proposed in the third place to consider whether the Church Discipline Act has been affected by the passing of the Public Worship Regulation Act, 1874, so far as the former related to offences against the ritual of the Established Church. The later Act is without doubt applicable to the offences with which Mr. Carter is charged; but it is clearly optional with the bishop to proceed under it; and this Court ought to pause before enforcing the older practice, when the legislature has introduced a new procedure for effecting the same object, especially where, as in the present case, the prosecutor is travelling out of the jurisdiction. But, further, it is submitted that the Public Worship Regulation Act, 1874, has by implication repealed the Church Discipline Act, s. 3, so far as it conferred upon the bishop a power to issue a commission at the instance of other persons to inquire into offences alleged to have been committed in conducting public worship. One object of the later statute was to simplify procedure, and it would be a legal incongruity, if whilst under the later Act three parishioners are compelled to ask the bishop's leave to prosecute, one of them upon his refusal could under the earlier Act compel him to take proceedings. It has been said to be a rule that several statutes on the same subject are to be read as one statute: *M'William* v. *Adams* (2); but this applies only when the statutes are consistent with one another; if there be an incongruity between two statutes, the earlier is repealed by the later; Maxwell on the Interpretation of Statutes, ch. vii. s. 3, p. 147; or if

(1) 10 Cl. & F. 200; 1 C. & K. 130. (2) 1 Macq. 120.

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the machinery provided by one statute is inconsistent with the machinery provided by the other, the inference to be drawn is that the legislature did not intend the earlier statute to stand: *Michell* v. *Brown* (1); *In re Baker*. (2) The creation of fresh machinery by the Public Worship Regulation Act, 1874, primâ facie implies a repeal of the Church Discipline Act, so far as it relates to offences against ritual; it is true that ss. 4, 18, of the later Act shew an intention to preserve the earlier; but these sections may be explained by the circumstance that upon a charge of ritualistic offences it was intended to preserve to the bishop the power to issue a commission "of his own mere motion." It has been already said, one object of the Public Worship Regulation Act, 1874, was to simplify procedure; but that was not the only object, for under the Church Discipline Act, ss. 6, 9, with the consent of the accused clerk the proceedings might be of a summary nature. It was intended that proceedings for offences as to ritual should be undertaken only by members of the Established Church, and in order to escape incongruity, this Court ought to hold that the earlier statute was repealed by implication, or, at all events, ought to decline to issue a discretionary writ.

The error underlying the judgment of the Queen's Bench Division is the assumption that the putting in force ecclesiastical law is a matter of right, and that it is for the public good that whenever a breach is committed it should be put into operation. It is submitted that this is an erroneous view. In many cases it is advisable that no proceedings should be taken for an ecclesiastical offence, and it is for the bishop to determine what are the cases in which an offender should be punished. Reliance was placed upon the decision in *Rex* v. *Barlow* (3), as shewing that the words "it shall be lawful" are to be read in a compulsory sense (4); but that case is plainly distinguishable, for in it constables claimed reimbursement of expenses incurred in the execution of their office, and those who have expended money in the discharge of a public duty, have an absolute right to be indemnified for the charges, which they have sustained.

(1) 1 E. & E. 267, at p. 274; 28 L. J. (M.C.) 155, at p. 164. 3 Jur. N.S. 9
L. J. (M.C.) 53, at p. 55. 5 Jur. N.S. 107. - (3) 2 Salk. 609.
(2) 2 H. & N. 219, at p. 242; 26 (4) Ante, p. 258.

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A. Charles, Q.C. (*Dr. W. G. F. Phillimore*, with him), for Rev. T. T. Carter. As to the question what was the practice in the Ecclesiastical Courts as regarded the promotion of the office of the Judge before the Church Discipline Act, it is desired to crave in aid the argument by the counsel for the bishop; and it is necessary to allude to only one circumstance. In the judgment of the Queen's Bench Division (1), it is assumed that the legislature did not intend to place a party desirous of punishing an ecclesiastical offence in a worse position than he would have been before that statute. Even if this assumption be correct, it does not shew that any person could at his pleasure prosecute criminally; for the only procedure which a person was entitled to adopt without the leave of the bishop was accusation, and at the time of passing the Church Discipline Act accusation did not exist in England: Ayliffe's Parergon, 26.

As to the construction of the Church Discipline Act, it is contended that it vests the jurisdiction over ecclesiastical suits in the bishop, to whom it is necessary to apply for leave to institute proceedings. If the discretion of the bishop can be in any way controlled, it must be by appeal to the archbishop of the province. It may be contended on behalf of the prosecutor that upon the construction urged on behalf of the defendants, the words "if he shall think fit" in the second branch of s. 3 will be superfluous; but this objection is unsustainable, for it equally applies to ss. 6, 13, where the same or very similar words must in any point of view be superfluous. But it is unnecessary to read the words "if he shall think fit" in s. 3 as superfluous; they may be treated as applying to a case where, upon a complaint being made to the bishop of an ecclesiastical offence, he declines to proceed upon the complaint, and elects to prosecute of his own motion. The cases of *Rex* v. *Barlow* (2) and *Morisse* v. *Royal British Bank* (3) are not relevant to the question now before the Court. They related to pecuniary interest, whereas the interest of the prosecutor in the present case is only as to ecclesiastical matters, and is no greater than that of any other member of the Church of England. The application for a commission is the only stage at which the bishop

(1) Ante, p. 270. (2) 2 Salk. 609.
(3) 1 C. B. (N.S.) 67; 26 L. J. (C.P.) 62.

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can exercise a discretion. When the commissioners have reported that a primâ facie case exists, proceedings must go on. The commissioners have no authority to stay proceedings; their only authority is to decide by the examination of witnesses (s. 4) whether there is sufficient ground for taking further steps against the accused clerk, the bishop having in the first instance determined whether an ecclesiastical offence is charged. If the bishop unreasonably refuses to institute proceedings, an appeal lies to the archbishop under the Statute of Citations, 23 Hen. 8, c. 9, which is kept alive by s. 19, and the scope of this section is not limited by s. 23. The proper remedy of the prosecutor is by preferring an indictment under the Acts of Uniformity; for the Church Discipline Act relates only to proceedings in the ecclesiastical, and not in the temporal Courts, and this remedy being effective a mandamus will not lie. The decisions upon the statute which have been cited by the counsel for the bishop shew that a common understanding in the legal profession, and an almost unbroken current of judicial authority, have existed in favour of the view urged on behalf of the defendants; and therefore, even if the principle originally laid down were wrong, it ought not to be interfered with: *Morgan* v. *Crawshay*. (1)

[THESIGER, L.J. In cases of that class the owners of property had dealt with it upon the footing that a certain rule of law existed. I doubt whether they have any application to the present case.]

The proper mode of proceeding for the ecclesiastical offences committed by Mr. Carter is under the Public Worship Regulation Act, 1874. At the time when the Church Discipline Act was passed, offences against the ritual of the Church of England were not immediately in the contemplation of the legislation. Cases as to unsoundness of doctrine, such as *Gorham* v. *Bishop of Exeter* (2), did arise in the Ecclesiastical Courts; but the first case as to unlawful ritual was *Westerton* v. *Liddell* (3) commenced in 1855. The only method of rendering the Church Discipline Act and the Public Worship Regulation Act, 1874, consistent with each other is to hold that they both are discretionary.

(1) Law Rep. 5 H. L. C. 304, at pp. 319, 320. (2) 2 Rob. Ecc. Cas. 1.
(3) Moore's Special Report.

Dr. A. J. Stephens, Q.C., for the prosecutor. Before the Church Discipline Act any person, who could give security for costs and had not been excommunicated, could prefer a complaint in the Ecclesiastical Courts against a clerk in holy orders for an offence against the ecclesiastical laws; so soon as the judge had determined that an offence of ecclesiastical cognizance was charged, the citation issued as a matter of right. The Church Discipline Act was intended only to amend the mode of proceeding, and not to limit the right to prosecute. The old practice of the Ecclesiastical Courts continued down to 1840; its nature may be gathered from the pleadings and judgment in *Carr* v. *Marsh*. (1) No case from 1640 to 1840 can be cited shewing that leave to prosecute could be refused where an ecclesiastical offence was charged, sufficient security for costs given, and proper articles exhibited. The present question is whether the Bishop of Oxford has an absolute discretion to prevent the institution of proceedings against Mr. Carter for an admitted ecclesiastical offence, and this turns upon the construction of the Church Discipline Act, sect. 3. The difference between the Church Discipline Act and the Public Worship Regulation Act, 1874, is that under the earlier Act the bishop exercises his discretion through the commissioners who are a council to advise him, and the only discretion which he enjoys is in the choice of the commissioners; under the later Act the bishop himself exercises a discretion in entertaining or refusing an application for leave to proceed. If under the Church Discipline Act the bishop himself has power to investigate a complaint, what is the use of appointing the commissioners? Upon a review of the provisions of the statute the presumption is that every one making complaint of an ecclesiastical offence has a right to an inquiry by the commissioners in the prescribed manner; no injustice is done by the appointment of the commissioners, for their report is not tantamount to a conviction: *Ditcher* v. *Denison*. (2) If the words of s. 3 are construed as discretionary, the laity may be deprived of their right to have the public worship of the Church of England performed with the simplicity of the Protestant faith. The clause as to issuing the commission of the bishop's mere motion was intended to be discretionary, and therefore the words "if he shall

(1) 2 Phillim. Ecc. Cas. 198. (2) 11 Moo. P. C. 324, at p. 341.

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think fit" are inserted: in other parts of the statute, such as ss. 4 and 17, the words "it shall be lawful" are clearly compulsory. A public duty is imposed upon the bishop by s. 3, and therefore its words must be read as obligatory and not as simply permissive: *MacDougall* v. *Paterson*. (1) As to the argument founded upon s. 19, it is to be observed that its words are only permissive and therefore cannot control the operation of s. 3; and further its real object was to preserve that part of the archbishop's primary jurisdiction which was confirmed by the Statute of Citations (23 Hen. 8, c. 9), and not to continue his right to entertain appeals; and therefore *Pelling* v. *Whiston* (2) is now scarcely to be deemed an authority, and, moreover, related to an appeal to the High Court of Delegates, a tribunal abolished by 2 & 3 Wm. 4, c. 92. The prosecutor "has no other specific legal remedy," and is therefore entitled to the mandamus: *Rex* v. *Marquis of Stafford* (3); and the mere fact that s. 3 has usually been considered discretionary, does not take away the right to apply to the Court for the writ; for a statute remains unrepealed, although it has not been put in force: Maxwell on Interpretation of Statutes, ch. xiii. s. 3, p. 380; *Leigh* v. *Kent*. (4) It has been argued for the defendants that it is absurd that the bishop should have no discretion under the Church Discipline Act, and yet should have a discretion under the Public Worship Regulation Act, 1874: the answer to this argument is that under the Church Discipline Act, s. 3, the commissioners have a discretion to determine whether further proceedings shall be taken, for, although the offence is proved to have been committed, they have power to report that the charge is frivolous and vexatious. There is no contrariety or repugnancy between the two statutes, and therefore they may well stand together: Dwarris on Statutes, p. 533 (2nd ed.). When Wightman, J., delivered judgment in *Reg.* v. *Bishop of Chichester* (5), he appears to have been of opinion that before the Church Discipline Act a clerk in holy orders was not liable to prosecution merely upon the ground of scandal; this was clearly a mistake; a clerk, although he had

(1) 11 C. B. 755; 21 L. J. (C.P.) 27.

(2) Comyns, 199.

(3) 3 T. R. 646, at p. 652, per Grose, J.

(4) 3 T. R. 362, at p. 364, per Lord Kenyon, C.J.

(5) 2 E. & E. 209, at p. 227; 29 L. J. (Q.B.) 23, at p. 30.

been acquitted of the offence charged, might be subjected to canonical purgation, if he gave cause for scandal: Conset's Eccl. Prac. part vii. ch. i. s. 1, par. 10, p. 386 (3rd ed.); as the foundation of the judgment was erroneous, it is entitled to little weight as an authority. It is submitted that the judgment of the Queen's Bench Division in the present case contains a correct exposition of the law, and ought to be affirmed in this Court. The argument for the prosecutor may be summed up in four propositions: first, for many years before 1840, when the Church Discipline Act was passed, any person not under civil disabilities could prosecute a clerk in the Ecclesiastical Courts; secondly, if an offence against the law ecclesiastical was charged and the promoter was well able to pay costs, permission to prosecute was granted as matter of course; thirdly, the Church Discipline Act does not abridge the right to prosecute; fourthly, if complaint be made of an ecclesiastical offence and the bishop refuse to proceed, he can be compelled by a mandamus to issue a commission under s. 3.

Jeune (with *Dr. A. J. Stephens, Q.C.*), for the prosecutor. It is contended that when a person complains of an ecclesiastical offence, and is willing to take upon himself all risks as promoter of the proceeding, the bishop is bound to issue a commission to investigate the truth of the charge. It may be that the view put forward by the counsel for the bishop as to the practice of the Ecclesiastical Courts before the Reformation is correct, and that it was only in "accusation" that proceedings could be taken without the leave of the bishop; and it is merely necessary to add that the mode of proceeding in "denunciation" is given in 1 Oughton, tit. 151, p. 227; it is however more material to consider what was the practice in subsequent times. From the date of the Reformation until 1840, the bishop, as distinguished from his judge, had no power to prevent the institution of a suit in his court: *Procurator-General* v. *Stone*. (1) It was the duty of the bishop to appoint a chancellor to exercise his judicial functions: 1 Burn's Eccl. Law, tit. Chancellor, p. 293 (9th ed.); 2 Phillimore's Eccl. Law, part iv. ch. iv. pp. 1211, 1212; and the archbishop might compel him to do so. The chancellor, when

(1) 1 Hagg. Cons. Rep. 424, at p. 425.

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appointed, was independent of the bishop, and the latter could not interfere with him; and hence the fact that the bishop of the diocese was interested in the cause, has been held to be no ground for prohibiting a cause before his chancellor in the Consistorial Court: *Ex parte Medwin.* (1) The judge of an inferior Court might send a cause by letters of request to a superior Court, and the bishop might promote the suit in the Metropolitan Court: *Bishop of Winchester* v. *Wix.* (2) A further question arises, whether the judge of the bishop's court had a discretion to prevent the institution of a suit: no doubt, in form it was necessary to obtain leave from the judge; but that leave was granted as a matter of course; so that practically the judge had no discretion. In *Carr* v. *Marsh* (3) it was expressly stated by Sir John Nicholl that the judge had power only to consider whether the alleged offence was of ecclesiastical conusance, and whether the promoter was of ability to pay costs. It is true that in *Lee* v. *Matthews* (4) the same judge used language not quite consistent with his ruling in *Carr* v. *Marsh* (3); but the explanation appears to be that in *Lee* v. *Matthews* (4) he was dealing with the question of the admission of the articles in a suit for brawling; and it may well be that the judge had discretion over the admission of articles, although he had practically no discretion to refuse to issue a citation. *Lee* v. *Matthews* (4) is of no authority as to citations. The first suit in *Maidman* v. *Malpas* (5) was no doubt dismissed because the leave of the judge to promote his office had not been obtained; but the explanation is, that the leave had not been applied for, and as a matter of form it was necessary to obtain that leave, although by the practice of the Court it was never refused. The right to demand security for costs perhaps arose from the fact, that in some instances the judge might be held liable for costs. It may perhaps be true that no instance can be found in which a mandamus was issued to a bishop's court to entertain a suit; but that is because Ecclesiastical Courts were too anxious to extend their jurisdiction, and required rather to be

(1) 1 E. & B. 609; 22 L. J. (Q.B.) 169.

(2) Law Rep. 3 A. & E. 19.

(3) 2 Phillim. 198, at p. 204.

(4) 3 Hagg. Ecc. Cas. 169, at p. 174.

(5) 1 Hagg. Cons. Rep. 205, at p. 209.

prohibited. In *Sherwood* v. *Ray* (1) the real question was whether a father had a sufficient interest to annul by a civil suit the marriage of his daughter on the ground of incest: therefore any remarks by the Court as to the necessity for obtaining the authority and consent of the Court in criminal suits were mere obiter dicta. In *Argar* v. *Holdsworth* (2) and *Turner* v. *Meyers* (3), it is expressly stated that the criminal suit was open to every one, and that a clergyman might be prosecuted by any one: these cases shew that in a criminal suit a personal interest is not required. In *Lee* v. *Fagg* (4) it was laid down that the criminal suit is open to any person promoting the office of the ordinary; for it is ad publicam vindictam, and to some extent concerns every member of the Church. If a criminal suit were wrongfully instituted, the defendant might have a remedy by petition to parliament. The Ecclesiastical Courts took cognizance of offences of a very small kind, and in the case of clerks, the office of judge could be promoted on the ground of scandal. By the Statute of Citations, if the bishop did not summon the accused before him, there was a remedy by appeal to the archbishop, but as a matter of fact the bishop's judge seldom refused a citation. Any wrong committed by a bishop towards a suitor might be redressed upon application to the archbishop. The Statute of Citations was aimed at the archbishop's court; for he claimed to exercise jurisdiction over every person residing in any part of his province. A bishop's power was confined to his own diocese; he had no control over those residing in other dioceses. As to the jurisdiction of the Ecclesiastical Courts before the passing of the Church Discipline Acts, the following propositions may be laid down: first, the bishop had no personal authority over the conduct or decision of a suit in his court: secondly, the judge had for all practical purposes no discretion to refuse to issue a citation for an ecclesiastical offence, at the instance of a promoter able to pay costs: thirdly, for any wrong done by a bishop a substantial remedy existed by appeal to the archbishop: fourthly, no person could be cited out of one diocese to appear before the court of the

(1) 1 Moo. P. C. 353.

(2) 2 Phill. Cases temp. Lee, 515, at p. 516.

(3) 1 Hagg. Cons. Rep. 414, at p. 415, n.

(4) Law Rep. 6 P. C. 38, at p. 41.

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bishop of another diocese. It is to be remarked that in criminal suits against laymen, although permission from the judge must be obtained to commence proceedings, yet that permission is granted as a matter of course, if the alleged offence is of ecclesiastical cognizance, and if adequate security is given: Coote's Practice of the Ecclesiastical Courts, pp. 144, 148. The form of the bond to be entered into by the promoter and his surety, is stated at p. 133 of the same book.

The object of the Church Discipline Act (3 & 4 Vict. c. 86) passed in the year 1840, was not to prevent the institution of frivolous suits but to facilitate procedure. A very large number of Ecclesiastical Courts then existed; their process was dilatory, and it was intended to introduce a simpler and more expeditious procedure: Report of Ecclesiastical Commission, 1832, p. 53. The Church Discipline Act, s. 23, abolished the jurisdiction of these Ecclesiastical Courts in criminal suits over clerks. Under the former practice the bishop could not sit in his own court, but by s. 11 he is empowered to hear the cause with the assistance of assessors. By s. 3 a commission is to be issued in order that an investigation may be held near the place where the offence is alleged to have been committed: the commissioners are to be nominated by the bishop not of the diocese where the accused clerk holds preferment, but of the diocese where the offence is supposed to have taken place. This circumstance disposes of the argument that the commission was to be issued by the bishop as pastor of his flock. The object of appointing the bishop to nominate the commissioners was that they should be chosen by an impartial person. The provisions of the statute are commented upon in *Sanders* v. *Head* (1), and it is plain that the commission is not a descendant of the old power to promote the office of judge. The bishop is not bound to hear and determine objections to his issuing a commission: *Ex parte Edwards* (2); and the reason is that it is a matter as to which he has no discretion. The commissioners, after hearing the evidence, may in their discretion report that there is no sufficient ground for taking further proceedings; and it would be a serious anomaly that the bishop should likewise have a discretion. Moreover, the exercise of the

(1) 3 Curt. 32, at p. 44. (2) Law Rep. 9 Ch. 138.

bishop's discretion, if it existed, would be governed by no rules, for he has no means of taking evidence, and this is a result which the legislature cannot be supposed to have contemplated. It is for the advantage of the Church that offences should be punished, and the only authority capable of pardoning an ecclesiastical offence is the Crown. Upon turning to the words of s. 3 it will be found that their collocation does not favour the theory that the bishop was to have a discretion; if the argument for the defendants is correct, the words in the second branch "if he shall think fit" can have no application, and are merely superfluous. A duty is imposed upon the bishop to issue a commission, and the rule is that where a public duty is imposed the officer intrusted with it is bound to discharge it, especially if it relates to the advancement of public justice: *Reg.* v. *Tithe Commissioners.* (1) In construing a statute which directs a thing to be done upon the performance of a condition, the thing must be done when the condition is performed: no other condition can be implied: *MacDougall* v. *Paterson* (2); *Morisse* v. *Royal British Bank.* (3)

[BRAMWELL, L.J. Persons invested with judicial authority must put the law in force, although they may think that in the case before them it will have an unjust operation, and although they are by statute clothed with a discretion: *Reg.* v *Boteler.* (4)]

It has been in effect argued that if it is compulsory upon the bishop to take proceedings, clergymen will be harassed with frivolous and vexatious charges, but they will be no worse off than any one of the Queen's subjects who may be unjustly and improperly sued in an action.

Reliance has been placed upon certain decisions in which it has been supposed to have been held that under the Church Discipline Act, s. 3, a bishop has a discretion; but they are not authorities against the prosecutor. In *Elphinstone* v. *Purchas* (5) there was no real discussion upon the question now in dispute. In *Reg.* v. *Bishop of Chichester* (6) the complainant was unconnected

(1) 14 Q. B. 459, at p. 474; 19 L. J. (Q.B.) 177, at p. 182. See Blackburn, J., in *Bell* v. *Crane,* Law Rep. 8 Q. B. 481, at p. 482.

(2) 11 C. B. 755; 21 L. J. (C.P.) 27.

(3) 1 C. B. (N.S.) 67; 26 L. J. (C.P.) 62.

(4) 4 B. & S. 959; 33 L. J. (M.C.) 101. See *Reg.* v. *Adamson,* 1 Q.B.D. 201.

(5) Law Rep, 3 P. C. 245.

(6) 2 E. & E. 209; 29 L. J. (Q.B.) 23.

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not only with the parish of the offending clergyman, but also with the diocese in which it was situate. In *Lee* v. *Fagg* (1) the discretion of a bishop to issue a commission was not in dispute; the question was whether the promovent had sufficient interest to maintain a civil suit. In *Ex parte Edwards* (2) the clergyman complained of claimed a right to compel the bishop to hear and determine objections to issuing the commission.

It has been said to be anomalous that there should exist a double remedy for an offence against the ritual of the Church of England, namely, under both the Church Discipline Act and the Public Worship Regulation Act, 1874; but an analogy exists in the common law: application may be made to the Queen's Bench Division for a rule for a criminal information based upon a charge of misdemeanour; if the rule is refused or discharged, the applicant, although he has failed to obtain a rule absolute, may for the same offence prefer an indictment to the grand jury, and if they find a true bill, may prosecute the offender to conviction. Even if a remedy other than by way of mandamus exists, it is not another remedy under the Church Discipline Act, and it is this statute which the prosecutor desires to put in force. But it is very doubtful whether any other remedy exists: an appeal to the archbishop from the decision of the bishop appears to be preserved by the Statute of Citations; but it is long since that statute was acted on, and in order to defeat the right to enforce the performance of a public duty by mandamus, the existence of another remedy must be clearly established: *Rex* v. *Nottingham Old Waterworks Co.* (3) It is no answer to an application for a mandamus that another remedy exists by indictment: *Reg.* v. *Bristol Dock Co.* (4) Moreover, the remedy by indictment is unsuitable at the present day to meet the offences charged.

It is not to be forgotten that when the bishop has issued a commission, he is bound to proceed if the commissioners report that there is a primâ facie case: *Reg.* v. *Archbishop of Canterbury.* (5)

Lastly, this Court ought not to interfere with the discretion of the Queen's Bench Division; but if it reviews it, regard ought to

(1) Law Rep. 6 P. C. 38.
(2) Law Rep. 9 Ch. 138.
(3) 6 Ad. & E. 355.
(4) 2 Q. B. 64, at p. 70.
(5) 6 E. & B. 546.

be had to the facts of the case, and it is admitted that many breaches of the laws ecclesiastical have been committed.

C. S. C. Bowen, in reply for the Bishop of Oxford and the Rev. T. T. Carter. Two questions arise upon the argument by the prosecutor's counsel: first, did a right exist in any person before the Church Discipline Act to promote the office of judge without his leave? secondly, did that statute confer a right upon laymen to prosecute clergymen at their pleasure? The answers to these questions have been evaded.

As to the first question, the office of judge was promoted at the humble request of the suitor: it has been argued that the consent of the judge was a matter of form; formerly local authorities and officers might not be sufficiently careful in checking litigation; but the power to refuse consent was recognised by the judges of the higher Ecclesiastical Courts. The discretion as to deciding whether the proposed promoter was of ability to pay costs appears to have been often exercised. It has been argued that a remedy by petition to parliament might exist if a suit were wrongfully instituted in an Ecclesiastical Court; but if parliament refused to receive the petition, no procedure would lie to compel it to do so, just as the Attorney General cannot be compelled to issue his fiat for a writ of error in criminal cases. (1)

As to the second question, it has been argued that if the Church Discipline Act, s. 3, is compulsory, clergymen may be exposed to groundless charges, but that they will be no worse off than any of the Queen's subjects who may be harassed with frivolous and vexatious actions; this is not correct, for a court of law has power to stay summarily actions of that kind. The commissioners have no discretion to determine that further proceedings shall not be taken; their duty is only to inquire into the truth of the charge. It is not contended for the bishop that the laws ecclesiastical may be broken with impunity; but it is a different question whether, in every case, the offender ought to be punished. If s. 3 is compulsory, the bishop may be obliged to appoint a commission in cases, in which it may be easily foreseen that the commissioners will report that there is no ground for instituting further proceedings; this consideration shews that the construction contended

(1) See *Castro* v. *Murray*, Law Rep. 10 Ex. 213.

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for by the prosecutor's counsel is unsustainable. Suppose that a clergyman having preferment in the diocese of Durham commits an offence in the diocese of London; the Bishop of Durham has an absolute discretion in the first instance to send the case by letters of request to the Metropolitan Court (s. 13); is it to be compulsory upon the Bishop of London to issue a commission, and if the commissioners report that there is a primâ facie case, upon the Bishop of Durham to allow proceedings to be thereupon taken? It has been alleged for the prosecutor that he wishes to enforce the Church Discipline Act; he may attain this end by appealing to the archbishop from the bishop's refusal; this right of appeal, confirmed by the Statute of Citations, is preserved by the Church Discipline Act, s. 19. The contention for the prosecutor reduces the bishop of the diocese, where an ecclesiastical offence is alleged to have been committed, to the position of a sheriff's officer, or, at least, of a prosecutor at the instance of every heated partizan.

Cur. adv. vult.

May 30. The following judgments were delivered:—

BRAMWELL, L.J. I am of opinion that this appeal must be allowed; that our duty is marked out for us. There is from the time the Church Discipline Act passed until now such an amount of authority as to its construction, that in my judgment we are bound to follow it. It was decided in *Reg.* v. *Bishop of Chichester* (1) in 1859 that it was not compulsory on the bishop under s. 3 to issue the commissions there mentioned. I have the authority of Sir R. Phillimore for saying that Lord Campbell told him he had concurred in the judgment and reasons of Wightman, J. The same was decided by the Privy Council in *Elphinstone* v. *Purchas* (2) in 1870. Before and between the times of the two decisions, beginning in 1842, there is a vast amount of expression of well-considered opinions to the same effect. There are, indeed, some expressions of doubt; not, as I think, indicating a *contrary* opinion, but indicating a *doubt* whether the statute was or was not obligatory. There is also one clear expression of opinion that it was by one whose authority I desire to treat with the greatest respect—

(1) 2 E. & E. 209; 29 L. J. (Q.B.) 23. (2) Law Rep. 3 P. C. 245.

6 Jur. N.S. 120.

I mean the opinion of Dr. Lushington in *Ditcher* v. *Denison*. (1) Of this, however, it may fairly be said that it was not necessary for the judgment, was expressed as a defence for the archbishop in answer to complaints against him for having proceeded, and was founded on what certainly was, as I think, an erroneous belief of the opinion of Lord Stowell and Sir John Nicholl as to the state of the law before the statute. But giving all weight to these doubts and to this decision, they are not to compare with the authorities the other way. The last of them was the decision of *Elphinstone* v. *Purchas* (2), a decision of the Privy Council, the ultimate Court of Appeal in causes ecclesiastical. It is remarkable that in the judgment appealed from this case is only referred to in examining the state of the law before the Church Discipline Act. It is, however, a decision on this very Act, and on the very question before the Court below, and now before us. In my opinion we are bound to follow it, and should be, even if not preceded by the other cases and authorities I have referred to. Taken with them, with all respect to those who have thought otherwise, I cannot but think that we are concluded. The decisions and opinions are such and so many that we ought to follow them. This is my conviction. I think that at least none but the ultimate Court of Appeal should overrule opinions so expressed, even if that should; as to which I content myself with observing that where the law has been laid down, and generally supposed and taken to be correctly laid down and acted on, great judges have doubted much whether if wrong the remedy was in the judicature. I do not examine the authorities in detail, as Baggallay, L.J., in his judgment has done so, and I entirely agree in all he has said on these cases on this head, and also on those relating to the state of the law before the Church Discipline Act. But there is one matter on which I wish to say a word. Both my learned Brothers have discussed our admission of the opinion given by the Lord Chancellor to the House of Lords on the occasion of the Public Worship Regulation Act, 1874. I really do not know that there is any definite rule as to what may or may not be cited and acted on as authority. No doubt, we must act on general principles, and I suppose they would exclude what is said in

(1) 11 Moo. P. C. 324. (2) Law Rep. 3 P. C. 245.

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debate in either House of Parliament. But to reject the opinion of the head of the law as to what is the law, given to advise the highest court of judicature in the country, sitting indeed in its legislative capacity, and at the same time admit the obiter dictum of a judge at nisi prius either in our own or an American court seems somewhat strange, more especially as it is certain that if it ought to be excluded, any judge knowing of it and excluding it, would as soon as he left the court consult the Hansard he had before rejected. I cannot think it was wrong to admit it.

I am prepared, then, on this ground to reverse the decision of the Court below, and I am not sure that I ought to say more. If the law is laid down, it is immaterial for our purpose whether it is rightly laid down or not. We must follow it. To discuss may seem to doubt its correctness. However, as I cannot but think that if unaided by previous expressions of opinion I should have come to the same conclusion, I wish to say why. The question is whether s. 3 of the Church Discipline Act makes it compulsory on the bishop to issue a commission on a complaint made to him of an offence against the laws ecclesiastical committed by a clerk in his diocese. To determine this it is admitted by both sides that it is desirable to ascertain what was the law in relation to such matters before the Church Discipline Act; whether the bishop was bound to allow the office of judge to be promoted, or whether it rested within his discretion. Now, it does appear to me most clear that the latter is the truth; positively the whole authority is one way, the few expressions that might seem contrary referring to the duty of the bishop to exercise his discretion in favour of allowing the office to be promoted when a proper case was presented to him. The opinion of Lord Stowell is express, that it is not enough that a primâ facie case is made out. The motives and design of the would-be promoter must be looked to. It was attempted to make out that there is something midway between a discretion and no discretion. It is certainly true that where one man affirms a thing to exist and another affirms it not to exist, neither may make out his proposition; nevertheless one of those propositions is inevitably true. And if in order to construe a statute we must see what the law was before it, we must find that it was or that it was not as the one or the other party alleges. It

cannot be and not be, or anything between the two. No doubt there may have been a discretion in the bishop, so that allowing the promotion of the office of judge was not ex debito justitiæ, and yet there may have been a practice, and in a sense a duty, a moral duty, or duty of imperfect obligation, to permit it in a proper case. But if that is the middle term—if it was only "almost of right," and not *quite*—it was *not of right;* and then it remains that it was not an enforceable duty, that the law would not compel its performance, that it was not ex debito justitiæ, and that the bishop had a discretion, and, if not restrained by his conscience, could, that is, had power to refuse it even improperly, and could properly and rightfully refuse it in all cases where his conscience told him he ought to do so. I can have no doubt this was the case before the statute. I do not understand the Court below to have held otherwise, or I should not speak so confidently. Of course, it does not settle the question before us. The legislature may have thought that the proceeding was so much of course that it might be made compulsory with no practical alteration. But supposing there was a discretion before the Church Discipline Act as to allowing the office of judge to be promoted, is there anything to shew that that discretion should cease, and none be substituted for it? I cannot see anything to that effect. The statute is to alter procedure. It still leaves it discretionary whether the bishop will not in certain cases send the case by letters of request to the Metropolitan Court; and this strange consequence would follow from holding the section to be compulsory, that if the bishop should think that *nothing* ought to be done, but that if *any* step was to be taken it would be better it should be by letters of request, he could not be compelled to take that step, but could be compelled to take the other though he thought it the worse of the two. But whatever was the former law or practice, let us examine the section. There is no provision regulating who is to be the complainant: it may be any one, man, woman, or child, churchman or other, for aught I can see. There is no provision how the complaint is to be made, by writing or verbally; no provision how, if at all, it is to be verified; no provision that the complainant shall undertake to prosecute, or shall be liable to costs; no provision as to the character or nature

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of the offence, how far its prosecution may be desirable in the interests of religion or morality; not a word as to its being possibly an isolated offence, and unintentional and atoned for; nothing as to the motives or object of the complainant. I can only understand the omission of all these matters by the legislature having given a discretion to the bishop to refuse to issue a commission, unless it was asked in a proper case by a proper person, properly substantiated, and with some satisfactory assurance it would be properly prosecuted, and possibly with a liability to costs. Of course, I am aware that on general principles the complaint must be bonâ fide, but how is the bishop to determine this unless he has some discretion? It is said as to this, and as to the other matters I have mentioned, that the Queen's Bench would not issue a mandamus except in a proper case; but what is that but to transfer the discretion from the bishop to the Queen's Bench Division, and with this singular consequence, that if a bishop refused to issue a commission on the ground that the matter complained of was not an offence ecclesiastical, the Queen's Bench must sit in judgment on him, and if they hold it is, order him to issue the commission. Now I have too much regard for the Common Law not to prefer it and its judges to all other, but I cannot think that it is desirable it should have such a duty as this put on it. If it should be said that it has often to lay down for inferior tribunals a law which it has not to administer, I admit it; but it is a law within its cognizance and competency, depending on the Common Law or statute. It is said that the mischiefs here pointed out are obviated by this, that the commissioners have a discretion, and, if they think it undesirable to proceed with the case, may report that there is no primâ facie ground for so doing. I am by no means clear that they ought to do so. The inclination of my opinion is that they are to inquire whether the case is primâ facie established in fact. But suppose they could; if there is no discretion in the bishop, what would that be (to apply a previous argument) but to transfer the discretion from him to them, and why should that be done? especially when it is remembered that the commission cannot be issued without trouble and expense to the commissioners and party complained of. Another argument against this being obligatory on the

bishop is that it is contrary to analogy. Complaint is made that there may be a wrong unpunished. So there may be at Common Law. The Queen may pardon; the attorney general enter a nolle prosequi to any indictment. Why may not the bishop, who is in the nature of prosecutor, do the same? It is strange that if Mr. Carter should be indicted for these offences, the prosecution could be stopped, but cannot be if proceedings are in the Ecclesiastical Courts.

I now proceed to examine the words of the section, and I confess I do so with a strong belief they will not be found to be compulsory. It cannot be doubted that the Act is very loosely drawn. In discussing the section I will leave out for the moment the bishop's alternative power to issue the commission "of his own mere motion if he thinks fit." "It shall be lawful." That means shall have power. Primâ facie those words import a discretion, and they must be construed as discretionary, unless there be anything in the subject-matter to which they are applied, or in any other part of the statute to shew that they are meant to be imperative, per Crompton, J., *In re Newport Bridge.* (1) It is for those then who assert that these words are imperative, to prove it. I think they fail to do so. No doubt, a power given for the furtherance of justice is to be exercised and is a command. I quite assent to the remark of Mr. Justice Coleridge that "words only directory, permissive, or enabling, may have a compulsory force where the thing to be done is for the public benefit, or in advancement of public justice." But it is to beg the question to say that that is the case here. The justice must be a justice, which it is desirable should be exercised, and not a power such as this under such circumstances as I have pointed out. No doubt the public are interested in the matter; but their interest must be that in some cases there should be no prosecution. I know the danger of laying down a rule, how impossible it is to anticipate all possible exceptions. But I think the following may be of some use in ascertaining whether enabling words are compulsory. A statute giving a power means that it should be exercised in certain cases; where the conditions of those cases are always the same, then it must mean the power should be exercised in all those

(1) 2 E. & B. 377.

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cases, and so is compulsory: see the reasoning of the judges in the above case of *In re Newport Bridge* (1), and especially of Blackburn, J., at p. 382, and what was said by the Court in *MacDougall* v. *Paterson*. (2) An example of this is seen in the last case, where the power to give costs was made dependent on the plaintiff living twenty miles from the defendant. That was the sole condition, and of course would exist without variation in every case where it existed at all. But where the circumstances of the cases vary, then words empowering, but not commanding, are not obligatory. It may be said that rule might apply here, and that it was enough that "a complaint" was made, be it what it might or by whom. To my mind it is impossible so to hold, and the statute must mean a complaint such as ought to be inquired into, and so a discretion is given to the bishop. This would have been by construction of the section, supposing the words, "or if he think fit of his own mere motion," had not been there: do they make any difference? I think not. It is said that they shew that he is *not* compelled to act of his own mere motion, and consequently that he *is* on complaint made. I do not think so. They might assist in the construction of a clause when there were considerations on both sides of equal weight and doubtful language, and tend to shew that the part without them was compulsory. I do not think they do so. I admit they are superfluous words on this view: I incline to think they are inevitably so. I cannot well understand how a man can be *bound* to act of his own mere motion. Suppose "if he think fit" were omitted, would he be *bound* to act of his own mere motion? I admit that is not the question here, but it bears on it; because it shews that the words are superfluous, unless they are put in to shew that the bishop must act on complaint, whether he thinks fit or not. But surely the right way to say that would be to say it in words, and not by implication, from the use of otherwise superfluous words elsewhere. In addition to this, it is to be observed that these words are continually used in the statute, where they are absolutely useless; and that though "it shall be lawful" may mean "shall" in one or more parts of the statute, it most certainly generally means "may" only. On these grounds I construe the section, as it has

(1) 2 E. & E. 377. (2) 11 C. B. 755.

been so often and so authoritatively construed before. I say nothing about the Public Worship Regulation Act, 1874, save this, that it is certainly not obligatory. Why not? if the Church Discipline Act is, I cannot see. I cannot say that such a state of things would be a legislative absurdity, but I cannot see the reason of it.

Other arguments have been urged on both sides, which I refer to unwillingly, but which ought to be noticed, or it may be supposed they have been lost sight of. It is said by the respondent that to reverse the decision in this case would be to leave the laity at the mercy of the clergy; by the appellants it is urged that to affirm the judgment would be to transfer the discipline of the Church from the bishops to the Queen's Bench. These arguments are relevant as shewing the probability or improbability of such legislation as each contends for. I think it unnecessary to express any opinion on these matters—matters which mankind have so dealt with as to make them of the greatest importance to human happiness. But fortunately we can, I think, construe the statute without expressing an opinion on these subjects. For my own part I desire to add that there is no question of religion, no question even of ritualism before us. I have not read any one of the charges made against Mr. Carter, it being admitted that they are true and shew ecclesiastical offences. The question before us is the same as if the complaint had been one of brawling in the church. But with reference to the costs of these proceedings, and in order that silence should not be misunderstood, I must say one word on what may be called the merits of the question between the appellants and the respondent. I have lived long enough to learn that two right-minded men may honestly take different views of what is right in the same matter: and I have no doubt that the right reverend bishop and the reverend gentleman who are appellants have been perfectly conscientious in their conduct in this affair. But it is admitted that Mr. Carter has committed, and is wilfully and knowingly persisting in committing six several breaches of the law of the land, acts for which he might be indicted and punished. By what means he has persuaded himself that he can receive the wages of the State to do a certain duty, and not do it but do that which is opposed to it, I cannot conceive; and, with all submission, I feel a nearly equal difficulty in understanding

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how it can seem right to the right reverend bishop not to bring him to justice. Of course, recognising as I do that the bishop possesses a discretion in this matter, I most fully admit he is vastly more capable of exercising it well than I am. But the way he does exercise it is subject to criticism even by those less competent than himself (in the same way as the opinion and sentences of judges may and ought to be and are criticised by laymen), and especially must be by me in reference to the costs of these proceedings. And it does seem to me (I speak with sincere respect) that the discretion here has been most erroneously exercised. It is as though a public prosecutor should refuse to prosecute a man guilty of and persisting in a public nuisance against the rights and to the injury of the neighbourhood, because the offender was old and respected, and because some of the neighbours worked for him, and because some prosecutions for nuisance had recently failed. It seems to me the appellants have invited and provoked this litigation; and as one appellant breaks the law, and the other affords him impunity, I think there should be no costs allowed to either of them.

BAGGALLAY, L.J. These two appeals are brought, the one by the Bishop of Oxford, and the other by the Rev. Thomas Thellusson Carter, rector of the parish of Clewer, in the diocese of Oxford, against an order of the Queen's Bench Division, made on the 8th of March, 1879, for a mandamus to the bishop, commanding him, either to issue a commission for the purpose of making inquiry as to the grounds of certain charges preferred by one Dr. Julius, a parishioner of Clewer, against Mr. Carter for offences alleged to have been committed by him against the laws ecclesiastical, or to send the case by letters of request to the Court of Appeal of the province, to be there heard and determined according to the law and practice of that Court.

It is unnecessary to specify the particular offences with which Mr. Carter was charged; it is sufficient to say that they consisted in unauthorized deviations from the established ritual and ceremonial of the Church of England.

The application for the mandamus was supported by affidavits, verifying the practices which formed the subject of complaint,

and, as the statements in such affidavits were in no way contradicted or explained, it must be assumed, at any rate for the purposes of these appeals, that Mr. Carter had committed the offences, with which he was charged, within the diocese of Oxford.

It has been suggested, on the part of the appellants, that there was no sufficient evidence before the Queen's Bench Division of a refusal on the part of the bishop to entertain the complaint of Dr. Julius, and that, consequently, if the Court had any jurisdiction to make an order for a mandamus, the order should have been limited to a mandamus to entertain the complaint of Dr. Julius; but, having regard to the correspondence which has passed between the bishop and Dr. Julius and his solicitors, it must, in my opinion, be assumed that the bishop had taken into consideration the subject of the complaint, and, for reasons, which were satisfactory to himself, had refused to institute proceedings under the powers conferred upon him by the Church Discipline Act; indeed, the reasons of the bishop for so refusing appear from his letters, which have been put in evidence: concisely stated, they are as follows: 1. His unwillingness to increase the injurious consequences to the Church, which, in his opinion, had been occasioned by other proceedings of a similar character: 2. His regard for the strongly expressed wish of the great majority of Mr. Carter's parishioners that proceedings should not be taken against him: and 3, the advanced age of Mr. Carter and the general respect and esteem, in which he was held by those who knew him. The learned judges, who constituted the Court when the order appealed from was made, were of opinion that it was not within the discretion of the bishop to refuse to interfere, when complaint was made to him of offences committed, or alleged to have been committed, within his diocese; and that, whatever might be his own opinion as to the propriety or expediency of so doing, it was obligatory upon him, under the provisions of the Church Discipline Act, to adopt one or other of the two courses referred to in the order, though he had a discretion, as to which of those two courses he would adopt.

Now, the authority to issue a commission is conferred by the 3rd section of the statute, and it is conferred upon the bishop of the diocese, within which the offence is alleged to have been

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committed; whilst the authority for sending the case by letters of request to the Court of Appeal of the province is conferred by the 13th section on the bishop of the diocese in which the accused party holds preferment; but inasmuch as, in the case now under consideration, the offences are alleged to have been committed in the same diocese as that in which Mr. Carter holds preferment, each of the two authorities, if exercisable at all, is to be exercised by the same bishop, and the sending of letters of request is, in this case, an alternative only for the issuing of a commission; the substantial question, therefore, which we have to determine, is whether, according to the true construction of the 3rd section of the Church Discipline Act, the power conferred upon the bishop of issuing a commission is one, which it was obligatory upon him to exercise when applied to by Dr. Julius, or whether he had a discretion to exercise it or not, as he might think fit. And the answer to this question depends upon the meaning to be attributed to the words "it shall be lawful," as used in the 3rd section. Now, primâ facie, these words import a discretion; but, to adopt the language of Coleridge, J., when delivering the judgment of the Court of Queen's Bench in the case of *Reg.* v. *Tithe Commissioners.* (1) "It has been so often decided as to have become an axiom, that, in public statutes, words which, in themselves, are directory, permissive or enabling, *may have* a compulsory force when the thing to be done is for the public benefit or in advancement of public justice." Such words may have different meanings in different sections of the same statute, or even in different portions of the same section; and, whether, in any particular section or portion of a section, they are to be regarded as compulsory or as importing a discretion, must depend, not only upon the immediate context, but also upon the object and general scope of the enactment.

The arguments, which have been addressed to us on behalf of the appellants, may be conveniently classed under the three following heads, though they were not put before us in the same sequence: 1. That the provisions of the Church Discipline Act, so far as they confer a jurisdiction in respect of such offences as those preferred against Mr. Carter, have been in effect repealed by the

(1) 14 Q. B. 474.

Public Worship Regulation Act, 1874: 2. That, if those provisions are still in force in respect of the offences with which Mr. Carter is charged, the construction of the 3rd section has been settled by authority, which is not open to any court, whether of primary or appellate jurisdiction to question; and that, according to the construction so settled by authority, the power conferred upon a bishop of issuing a commission is one which he may exercise or abstain from exercising at his discretion. 3. That if the true construction of this section ought not to be regarded as settled by authority, it is nevertheless that for which they contend.

But before proceeding to consider the arguments so addressed to us, it will be convenient, and particularly so with a view to a full appreciation of the authorities to which attention will be directed presently, to trace the several steps of the new procedure introduced by the Church Discipline Act, the object of which, as stated in its preamble, was "to amend the manner of proceeding in causes for the correction of clerks." Now, in approaching the consideration of the 3rd section, we cannot fail to observe the very wide terms in which the authority thereby conferred upon the bishop, is expressed. If a clerk in holy orders is charged with any offence against the law ecclesiastical, however grave or however trivial such offence may be, or, even if he be not so charged, if there exist concerning him any scandal or evil report of his having so offended, it is open to any one, whether a parishioner or an entire stranger to both parish and diocese, without any pecuniary or other personal interest in the matter, and whether a member of the Church of England or not, to make complaint to the bishop of the diocese in which the offence is alleged to have been committed, and power is conferred upon the bishop upon such complaint being preferred, to issue a commission for the purpose of making inquiry as to the grounds of the charge or report. I do not stop at present, to consider whether the authority so conferred is one which the bishop is under an obligation to exercise, or whether it is within his discretion to abstain from exercising it, but pass on to notice the proceedings consequent upon the issuing of a commission. Under s. 4, the party accused is to have notice of the meetings of the commissioners, and may attend them, if he thinks fit; power is conferred upon the commissioners to examine

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witnesses upon oath for the purpose of ascertaining whether there are sufficient primâ facie grounds for instituting further proceedings; and, if the commissioners, or a majority of them, are of opinion that there are such primâ facie grounds, they are to transmit to the bishop a report to that effect with the depositions of the witnesses. It is to be observed that the Act contains no provisions as to the parties by whom, or the sources from which, the expenses connected with such proceedings are to be defrayed; though it is obvious that in many cases the expenses must necessarily be considerable. The Act next provides (sect. 5), that in case the party accused holds any preferment in any other diocese than that in which the offence has been committed, the bishop to whom the report shall be made is to transmit a copy thereof and of the depositions to the bishop of such other diocese; and at this stage of the proceedings the bishop of the diocese in which the accused party holds any preferment, may (sect. 6), with the consent of the accused party and of the party complaining pronounce sentence without any further proceedings; but if sentence be not pronounced, *either the last mentioned bishop or the party complaining*, may proceed against the accused party, in which case articles are to be prepared and filed, and the bishop, with the aid of three specially qualified assessors, is to hear and determine the cause and to pass sentence therein according to ecclesiastical law; this portion of the procedure is provided for in ss. 7 to 12. Now, with reference to that portion of the procedure to which attention has as yet been directed, it is to be observed, that the bishop, who is to hear and determine the cause, is not *necessarily* the bishop in whose diocese the offence is alleged to have been committed, and by whom the commission has been issued; in all cases in which the accused party holds preferment in any other diocese than that in which the offence is alleged to have been committed, the powers and the duties of the bishop of the diocese, in which the offence is alleged to have been committed, begin with the issuing of the commission and end with the forwarding of copies of the report and of the depositions to the bishop of the diocese in which the accused party holds preferment. In a case in which the offence charged is one against religion, as for instance, promulgating heretical doctrine, contravening the thirty-nine articles, or

depraving the Book of Common Prayer, it is not unfrequently committed by a publication in the metropolis, or other town, though the author is beneficed in a diocese remote from the place of publication; but in a case like the present, in which the offence charged is in respect of ritual or ceremonial, it is more frequently committed within the diocese in which the accused party holds preferment. It is perhaps not immaterial to observe that offences of this latter kind were, comparatively speaking, unknown at the time when the Church Discipline Act was passed; the case of *Westerton* v. *Liddell* (1), in the year 1855, was probably the first case of this character, at any rate, in modern times. But it is further to be noted that, when the commissioners have reported, however ready and willing the accused party may be to acknowledge his fault and to submit to such punishment, if any, as his offence may render him liable to, it is in the power of the party complaining, to insist upon a public prosecution with all its consequent annoyance, trouble, and expense. And it will also be observed that the provisions, as yet referred to, in no way provide for carrying the proceedings beyond the report of the commissioners in a case, in which the party accused is not the holder of any preferment. This, however, is to some extent provided for by s. 13, which enacts that it shall be lawful for the bishop of the diocese in which any such clerk shall hold preferment, or, if he hold no preferment, then for the bishop of the diocese in which the offence is alleged to have been committed, in any case, if he shall think fit, either in the first instance, or after the commissioners shall have reported that there is sufficient primâ facie ground for instituting proceedings, and before the filing of the articles, but not afterwards, to send the case by letters of request to the Court of Appeal of the province, to be there heard and determined according to the law and practice of the Court. Now, here it is to be noted that, if the clerk holds any preferment, the bishop to whom complaint is made, unless he happens to be also the bishop of the diocese in which the preferment is held, is not empowered to send the case to the Court of Appeal; all that he is authorized to do in such a case is to issue a commission and receive the commissioners' report; whilst on the other hand, his

(1) Moore's Special Report.

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power to issue a commission, whether it is obligatory upon him or not to exercise it (which I am not at present considering), is liable to be interfered with and rendered nugatory by the exercise by the bishop of the other diocese of the power, conferred upon him by the 13th section of sending the cause in the first instance to the Court of Appeal. It would appear also, that in the case of an accused clerk, who is without preferment, any further proceedings which may be taken against him, in the event of a report by the commissioners that they are primâ facie grounds for them, must be in the Court of Appeal. There are two more sections in the Act, the purport of which should be noted. The 15th gives an appeal from the judgments of the bishop and of the Court of Appeal to the archbishop and to the Queen in Council; in the former case, the appeals are to be heard by the judge of the Court of Appeal of the province, and in the latter by the Judicial Committee of the Privy Council. The 24th section provides that when any act, save sending a case by letters of request to the Court of Appeal of the province, is to be done or any authority is to be exercised by a bishop under the statute, such act is to be done or authority exercised by the archbishop of the province in all cases where the bishop, who would otherwise do the act or exercise the authority, is the patron of any preferment held by the party accused.

Such being the general nature and course of the procedure introduced by the Church Discipline Act, I pass on to consider the first of the contentions pressed upon us on behalf of the appellants, namely, that the provisions of that statute, so far as they confer a jurisdiction in respect of such offences as those with which Mr. Carter has been charged, have been in effect repealed by the Public Worship Regulation Act, 1874. In my opinion this contention is untenable. The Public Worship Regulation Act, 1874, doubtless enables proceedings to be taken under certain circumstances for the correction of offences of the same or a similar kind to those charged against Mr. Carter, but the circumstances under which such proceedings may be taken are of a special character. The bishop must be put in motion, not, as in proceedings under the Church Discipline Act, by any one who chooses to intermeddle in the matter, but by certain

officials, namely, the archdeacon, or the churchwarden, or by three parishioners of the parish, who are respectively required to make delarations as to their being members of the Church of England; upon the application of persons so specially interested in the subject proceedings may be taken as provided by the Act; but the circumstance that a more simple form of procedure can be adopted under the later Act, when the parties complaining have a special interest in the subject-matter of their complaint cannot, in my opinion, afford any reason for holding that the provisions of the earlier Act are repealed by the later. I can see no inconvenience or incongruity in treating both enactments as in force. The consideration that Dr. Julius joining with two other parishioners, members of the Church of England, could initiate proceedings under the Public Worship Regulation Act, 1874, appears to me to afford no good ground for holding that Dr. Julius *alone* cannot initiate proceedings under the Church Discipline Act. But the terms of the statute itself negative any such inference. The 5th section enacts that nothing in the Act contained, save as therein otherwise expressly provided, shall be construed to affect or repeal any jurisdiction which was then in force for the due administration of ecclesiastical law, and the only express provision to be found affecting the Church Discipline Act is in the 18th section, which provides that when any suit or proceeding has been commenced against any incumbent under the Church Discipline Act, he shall not be liable to proceedings under the Public Worship Act in respect of the same matter, and that no incumbent proceeded against under the Public Worship Act shall be liable to proceedings under the Church Discipline Act in respect of any matter, upon which judgment has been pronounced in proceedings under the Public Worship Act. The language of this latter section appears to me to put it beyond all question, that it was the intention of the legislature that the provisions of both statutes should continue in force, to the extent that proceedings might be adopted under the one or the other, though it imposes a restriction, after the adoption of proceedings under the one upon proceedings under the other.

I pass on, then, to consider the *second of the contentions of the appellants*, namely, that the question of the construction of the

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3rd section of the Church Discipline Act has been conclusively settled by authority. Some forty years have elapsed since the statute became law, a period apparently sufficient to have allowed of the correct construction of the section being ascertained by competent and binding authority; but it cannot be denied that different or doubting opinions have been from time to time entertained and expressed, and to such opinions I propose now to direct attention.

With the exception of some observations made by Lord Campbell in December, 1842, in delivering the judgment of the Judicial Committee of the Privy Council, in the case of *Head* v. *Sanders* (1) to the effect *that there were no means of compelling the bishop to issue a commission, although he had given notice of his intention to do so*, there would appear to be no record of any judicial decision or dictum, affecting the question now under consideration, previously to the proceedings in the case of *Ditcher* v. *Denison*. (2) In that case, in consequence of the bishop of the diocese being the patron of the preferment held by Archdeacon Denison, the power of issuing a commission to inquire into certain offences against the laws ecclesiastical, alleged to have been committed by the archdeacon, which would otherwise have been exercisable by the bishop, were vested in the archbishop under the 24th section of the Act. In the month of November, 1854, application was made to the Court of Queen's Bench, on behalf of Archdeacon Denison, for a writ of prohibition to the archbishop, who had given notice of his intention to issue a commission, and, upon such application being refused, Lord Campbell (the other members of the Court being Wightman, Erle, and Crompton, JJ.) said: "The legislature has thought it inexpedient, where the bishop is the patron, to leave it entirely in the discretion of the bishop whether proceedings shall be instituted against the incumbent or not." In that case the bishop had it in his power, under the reservation contained in the 24th section, to send the case by letters of request to the Court of Arches, but he had declined to do so. And similar views, as to the discretionary character of the bishop's power to issue a commission, were expressed by Lord Campbell on other occasions during the

(1) 4 Moo. P. C. 186. (2) *Ex parte Denison*, 4 E. & B. 292.

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proceedings against the archdeacon; and particularly so on the occasion to which I am about to refer. The archbishop, after receiving a report from the commissioners that there were sufficient primâ facie grounds for instituting proceedings, declined to proceed further in the matter, and a rule nisi having been obtained for a mandamus commanding him to proceed, such rule was made absolute on the 24th of January, 1856, the Court being of opinion that *after the commission had once issued* the archbishop was bound to proceed; upon that occasion Lord Campbell said: "I have not the slightest doubt that his grace proceeded optimâ fide, with a view to the good of the Church over which he presided; but, with profound respect for his sacred character and high position, I must express some regret that *he did not exercise his power to refuse the commission*, and if he had done so, I think it would have been well for the Church of England." (1) In respect of the issuing a commission, the archbishop had the same power (whether to be exercised compulsorily or at discretion), as the bishop would have had if he had not been the patron of the preferment held by the archdeacon. In the course, however, of the same proceedings, after the rule for a mandamus commanding the archbishop to proceed had been made absolute, Dr. Lushington expressed a decided opinion to the contrary effect. When the case came on to be heard before the archbishop at the close of the year 1856, Dr. Lushington acted as one of his assessors, and in that capacity made known the conclusions at which his grace had arrived; in so doing, after stating that the duty ordinarily discharged by the bishop had devolved upon the archbishop by reason of the patronage of the preferment held by the archdeacon being vested in the bishop, he went on to say, "In the fulfilment of that duty, his grace caused the original commission to be issued, a duty which, as his grace has been advised, *it was imperative upon him to discharge, and respecting which there was no legal discretion vested in him;*" and, after quoting the words of the 3rd section of the Church Discipline Act, and repeating that the bishop applied to had no discretion, the learned judge proceeded to assign the reasons for the opinion he had so expressed, in the following terms: "If it were so" (that is, if the bishop had a discretion)

(1) *Reg.* v. *Archbishop of Canterbury*, 6 E. & B. 546.

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"the ancient law of the Church would have been subverted by the statute, which there was no intention to do. Lord Stowell, in the case of *His Majesty's Procurator-General* v. *Stone* (1), uses these words, 'It is not in the power of the bishop by any intervention on his part to refuse the process of the Court to any one, who is desirous of availing himself of it in a proper case.' That observation stands not only upon the authority of Lord Stowell, but is confirmed by that of Sir John Nicholl. What would be the consequence if the archbishop or bishop had a purely discretionary power to order the commencement of proceedings according to his own judgment, or, I might almost say, according to his own fancy? Why, in every bishopric within a province, or within the whole kingdom of England, it would rest entirely in the power of a single bishop either to permit a prosecution against any ecclesiastic for alleged unsound doctrine or immoral conduct, or, according to his own mere opinion, he might prevent any discussion taking place, and any charge, however serious, from being considered, the consequence of which might be that the uniformity which now happily prevails amongst the clergy of this country, would be destroyed or subverted." I have referred, somewhat in detail, to the language used by Dr. Lushington on this occasion, for the reason that, though other judges, as will presently appear, have entertained and expressed doubts upon the subject, he is, to the best of my belief, the only judge who, previously to the proceedings in the present case, had expressed it as his opinion that it was not within the discretion of the bishop when applied to under the provisions of the 3rd section of the statute, to abstain from issuing a commission, and for this further reason, that the judges of the Queen's Bench Division, when making the order from which these appeals are brought, expressed their entire concurrence in the views expressed by Dr. Lushington.

I propose at a later period to make some comments upon the reasons assigned by Dr. Lushington for the opinions so expressed by him, but, for the present, I pass on to consider the next authority in order of date, the case of *Reg.* v. *Bishop of Chichester* (2), upon which so much reliance has been placed by the counsel for the appellants. In estimating the importance of this case as an autho-

(1) 1 Hagg. Con. 424. (2) 2 E. & E. 209.

rity upon the question now under our consideration, it is essential to bear in mind what the points were which in that case called for a decision. In February, 1859, the Rev. Charles Golightly, a clerk in holy orders, residing in the diocese of Oxford, applied to the Bishop of Chichester to issue a commission under the statute to inquire into certain charges preferred by him against the Rev. Richard Randall, rector of Woollavington, in the diocese of Chichester, of offences against the laws ecclesiastical, the offences charged being in respect of certain practices and doctrine, which it was alleged that he had put in practice and taught in his own parish. Mr. Golightly had no connection with the parish of Woollavington, or with the diocese of Chichester, nor had he any private or personal interest in the matters complained of. The bishop, after inquiry, declined to interfere, and a rule having been obtained on behalf of Mr. Golightly, calling upon the bishop to shew cause why a mandamus should not issue commanding him to issue a commission, cause was shewn on the 2nd of July, 1859. On the part of the bishop it was contended that he had in all cases a discretion whether he would issue a commission or not, and, further, that Mr. Golightly was not a proper party to apply for a commission, and that consequently the Court, even if it should hold that the bishop had no discretion, where the party applying had a locus standi, might and would, in the exercise of its own discretion, refuse to issue a mandamus in the case under consideration. On the other hand, it was contended on behalf of Mr. Golightly, that the bishop had no discretion as to issuing the commission, but was bound to issue it upon application being made to him. The Court, at the hearing, was composed of Lord Campbell, and Wightman, Erle, and Hill, JJ.; but, before judgment was delivered, Lord Campbell was appointed Lord Chancellor, and Erle, J., became Chief Justice of the Common Pleas. Separate judgments were delivered by Hill, J. and Wightman, J., who, whilst they agreed in holding that the rule for a mandamus should be discharged, differed as to the grounds upon which they proceeded. Hill, J., in the course of his judgment, expressed himself as follows: "If it were necessary to give an opinion upon the construction of the 3rd section of the statute, I should have thought that the writ ought to issue, so that a question of such

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importance might be decided on the return in such manner that the judgment of the Court might be reviewed by a court of error; and I am not satisfied that it is a mere matter in the discretion of the bishop whether he will issue a commission or not, *if a proper complaint be made by a party who is entitled to complain.* But it appears to me not necessary to give any opinion on the construction of the statute. This is an application to the discretion of the Court to issue the prerogative writ of mandamus." The learned judge then proceeded to state that, in his opinion, it would be productive of the greatest inconvenience and mischief if the Court were to lend its aid to any stranger to compel a bishop to issue a commission in any particular case, and that on that ground the rule ought to be discharged.

Now, I am unable to see that the inconvenience or mischief will be any less, if, according to the proper construction of the third section, it is the duty of the bishop to issue a commission at the instance of any stranger; it is not to be supposed that the bishop will abstain from doing his duty, because another Court, having power to compel him to do it, will not exercise that power; and should he even be justified in abstaining from doing his duty, because the Court, in the exercise of its discretion, would not compel him to do it, it would be only removing the discretion from the bishop to the Court. But to proceed to the judgment of Wightman, J., it is unnecessary to refer to it in detail; it is sufficient to say that, in his opinion, it was the intention of the legislature to invest the bishops with a power of causing inquiry to be made in all cases, in which it appeared to them that the interests of the Church and of the public required it; and that it was more for the interests of religion and of the public that the bishop should be intrusted with a discretion as to issuing a commission than that it should be left entirely, as was expressed by Sir William Scott in a case to which I shall presently have occasion to refer, to the judgments or passions of private persons, who under the influence of zeal, or prejudice, or fancy, might call peremptorily upon the bishop, without any real or substantial ground, to institute proceedings, which would cause at once expense, trouble, and vexation, and tend to create disturbance and scandal in the Church. He was, therefore, of opinion, that the

bishop had a discretion as to the propriety of issuing a commission, and that the rule for a mandamus should for that reason be discharged. With reference to the reasons, so forcibly expressed by Wightman, J., for holding that the bishop might exercise a discretion as to the issuing or withholding a commission, it has been urged that he was mainly induced to arrive at that conclusion by an opinion, alleged to have been erroneously formed by him, that, previously to the passing of the Church Discipline Act, the office of the judge would only have been promoted in the case of some direct and positive charge of an offence against the laws ecclesiastical, and that no such proceeding could be had upon the ground only of the existence of some scandal or evil report of his having so offended, and the views, so pressed upon us, were pressed upon, and found favour with, the learned judges of the Queen's Bench Division. That Wightman, J., held that opinion cannot be doubted, and it may have, to some extent, influenced the judgment which he delivered, in the sense that it strengthened the convictions he had formed from a consideration of the inconveniences to which the contrary construction of the third section would give rise; but abundant evidence is, in my opinion, furnished by the general scope of the judgment that, quite irrespective of the opinion, so formed by him, as to the practice before the Church Discipline Act, he had arrived at the conclusion that the bishop had the discretion which he claimed to exercise. Nor do I assent to the proposition, that the opinion so formed by Wightman, J., was erroneous, though I do not deem it necessary to express any decided opinion upon the subject. I have been unable to discover any record or report of the office of the judge having been promoted in a case of evil report only. It is probably the fact that, when a clerk in holy orders was proceeded against by either of the forms of procedure formerly known as "inquisitio" and "denunciatio," in the former of which the bishop or archdeacon proceeded of his own mere motion, and in the latter upon the denunciation or presentment of the churchwarden, scandal or evil report might form the subject of the proceeding; and it is doubtless the fact that, in proceedings which were not ex officio, when the office of the judge was promoted in respect of an offence charged, an article was ordinarily, if not necessarily, exhibited to the effect that the

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offence charged had given rise to scandal or evil report. And it is in this sense, and in no further or other sense, that I read such passages as the following, which have been quoted from the old text-writers, in support of the view that the office of the judge might be promoted in respect of a mere scandal or report. It is said by Oughton that the articles were to contain "tam causas conventionis quam famam publicam;" and again, "Igitur in his articulis fama publica *objecti criminis* est alleganda et objicienda." And so, again, it is stated that *if the proof of the alleged offence failed*, but the existence of the evil report was established, the accused party might be put to clear himself by purgations. It was stated by Wightman, J., at the close of his judgment that both Lord Campbell and the Lord Chief Justice Erle were of opinion that the rule should be discharged, but without intimating whether they concurred with Hill, J., or with himself as to the grounds for such opinion. Having regard to the previously expressed opinions of Lord Campbell, in the cases to which reference has been made, it may, I think, be assumed that he agreed with the views expressed by Wightman, J.; on the other hand, it would appear that the Lord Chief Justice Erle, on subsequent occasions, disclaimed having acted on the ground taken by Wightman, J., though he does not appear to have upon any occasion expressed dissent from the views expressed by that learned judge. So far, then, as the decision in the case of *Reg.* v. *Bishop of Chichester* (1) is concerned, it cannot, I think, *taken by itself*, be treated as having established more than this, that, at the time when it was arrived at, it was a matter of uncertainty whether, according to the true construction of the third section, the bishop had or had not a discretion in respect of the issuing of a commission, when a complaint had been preferred. But twenty years have elapsed since the decision in that case, and during that period the general question whether the bishops have such discretion, as well as the decision in the case of *Reg.* v. *Bishop of Chichester* (1), as bearing upon that question, have on several occasions been the subject of judicial comment, and I proceed to refer to some of the cases in which such comments have been made.

In the case of *Re Newport Bridge* (2), which came before the

(1) 2 E. & E. 209 (2) 2 E. & E. 377.

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Court of Queen's Bench very shortly after *Reg.* v. *Bishop of Chichester* (1), the question to be determined was, whether the words "*it shall and may be lawful*," as used in a particular statute, were to be treated as imperative or as importing a discretion; the Court, consisting of Crompton, Hill, and Blackburn, JJ., held that the words were discretionary only; and, in support of this view, Crompton, J., in the course of his judgment, referred to the case of *Reg.* v. *Bishop of Chichester* (1) *as having decided* that the words "it shall be lawful" in the 3rd section of the Church Discipline Act were to be read as conferring a discretion, and added that *that appeared to him to have been a correct decision, though Hill, J., assented to it with hesitation.* Neither Hill, J., nor Blackburn, J., expressed any dissent from the view taken by Crompton, J., of the case of *Reg.* v. *Bishop of Chichester.* (1) It is quite true, as has been observed by the counsel for the respondent, that it was not necessary for the Court in that case to rely upon the decision in the case of *Reg.* v. *Bishop of Chichester* (1); but it is nevertheless referred to and relied upon by Crompton, J., as an illustration of the class of cases in which such words, when found in public statutes, were to be treated as importing a discretion. In March, 1868, Sir R. Phillimore delivered judgment in the case of *Martin* v. *Mackonochie* (2) in the Court of Arches; in the course of the arguments the motives of both parties to the suit were severely criticised by counsel, and, in reference to these criticisms, Sir R. Phillimore said in his judgment: "I must of course presume that the bishop was satisfied upon good grounds both *that it was proper that his office should be promoted*, and that Mr. Martin was a proper promoter, because his Lordship, who has the advantage of having a very learned legal adviser, was no doubt aware, from the decision of the Queen's Bench in the case of *Reg.* v. *Bishop of Chichester* (1), as well as from the decision of the Privy Council in *Sherwood* v. *Ray* (3), *that it was competent to him to exercise his discretion as to whether his office should be promoted or not.*" Again, in April, 1869, in consequence of the Bishop of London having declined to issue a commission, at the instance of Mr. Sheppard, to inquire into the doctrines propounded by the

(1) 2 E. & E. 209. (2) Law Rep. 2 A. & E. 116.
(3) 1 Moo. P. C. 353.

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Rev. W. J. Bennett, an application was made to the Queen's Bench for a mandamus to the bishop to issue a commission; the application was refused by the Court, consisting of Lush, Hannen, and Hayes, JJ., though not upon the ground of the bishop having a discretion in the matter, as to which it was unnecessary to arrive at a conclusion: Lush, J., in the course of the argument and in giving judgment, expressed in forcible language his full concurrence with the views expressed by Wightman, J., in *Reg.* v. *Bishop of Chichester* (1); and similar views were expressed by Hayes, J., and in no way dissented from by Hannen, J. And these cases were followed by the case of *Elphinstone* v. *Purchas* (2) in the Privy Council. The suit had been instituted in the Arches Court by letters of request from the Bishop of Chichester, the promoter being a parishioner of the parish within which the chapel at which the defendant ministered was situated; the offences charged consisted in the use of certain unlawful rites and ceremonies set forth in the articles exhibited. Sentence was pronounced by the Arches Court against the defendant upon some, but not upon all, of the articles; the promoter appealed from such sentence to the Queen in Council, but died soon after inhibition and citation had issued.

On a motion for the substitution of another parishioner as promoter of the appeal, who was not authorized by the ordinary or connected with the original promoter, and who had no personal or pecuniary interest in the subject-matter of the suit, it was held that, though the suit, as a criminal suit, had determined by the death of the original promoter, yet, having regard to the ancient practice of the Court of Delegates in such cases and the peculiar circumstances of the case under consideration, it was the duty of the Court of Appeal to allow a proper person to be substituted in the place of the deceased appellant and to revive the appeal. The Lords present on the hearing were the Archbishop of York, Lord Cairns, Sir James Colville, and Sir Robert Phillimore, and the judgment, having been reserved, was delivered by Sir R. Phillimore on the 14th of July, 1870. After referring to the proceedings in the suit, and to the questions raised by the appeal, and to the necessity of considering the general nature of the suit for the

(1) 2 E. & E. 209. (2) Law Rep. 3 P. C. 245.

satisfactory answering of such questions, the judgment proceeded in the following terms (p. 254): "It was decided by their Lordships in the case of *Sherwood* v. *Ray* (1), which was one of great importance, and very carefully considered by the eminent judges who sat upon it, among whom was Sir John Nicholl, perfectly acquainted with the practice of the Ecclesiastical Courts, that the promotion of the office of judge, though generally permitted as a matter of course, cannot be demanded ex debito justitiæ. Subsequently to this decision the statute 3 & 4 Vict. c. 86 was passed. By the 13th section it was enacted 'that it shall be lawful for the bishop if he shall think fit, either to issue a commission of inquiry, or, in the first instance, to send the case by letters of request to the superior Court.' In the case of *Reg.* v. *Archbishop of Canterbury* (2) the Queen's Bench held that when the archbishop had once issued a commission at the instance of a promoter, the bishop could not refuse to allow his office to be further promoted. In the case of *Reg.* v. *Bishop of Chichester* (3) the Queen's Bench refused to compel by mandamus the issue of a commission of inquiry at the instance of a person who was unconnected with the parish or diocese; and Wightman, J., expressed a strong opinion that under the general law, and under the words of the statute, the bishop had an absolute discretion to allow or refuse his office to be promoted in the first instance. In the present instance, however, it appears that the local ordinary, the Bishop of Chichester, thought both *that the cause was one which on the ground of public interest ought to be instituted*, and also that a proper person had applied for leave to promote the office of the judge. He moreover availed himself of the provision of the statute to send the case by letters of request to be tried in the superior Court of the province. Having taken this course, it was not competent to his Lordship, according to that decision to which we have referred, to stay or prevent the further prosecution of the suit." And after referring to several cases, in which a new promoter had been appointed where the former one had died during the progress of the suit, the judgment again proceeds in the following terms: "*Criminal ecclesiastical suits ought not to be, and it must be pre-*

(1) 1 Moo. P. C. 397. (2) 6 E. & B. 546.
(3) 2 E. & E. 209.

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sumed would not be, allowed to be instituted in the first instance by the ordinary, who has full control in limine over the subject, unless the public interest requires their institution. But it would be a great evil if, after the due institution under proper authority of such suits, the course of justice with respect to them could be arrested by any technical or formal ground." And a similar view to that taken by the Lords of the Privy Council in *Elphinstone* v. *Purchas* (1) as to a discretion being vested in the bishop to refuse to issue a commission, was adopted in 1873 by Lord Selborne, then Lord Chancellor, in the case of *Ex parte Edwards.* (2) In that case Mr. Edwards, the clerk against whom the complaint was brought, filed a statement of objections to the issuing of a commission, the objections being that the party by whom the complaint was preferred was a Dissenter, that his application was not bonâ fide, and that it was an unlawful transaction amounting to maintenance, the proceedings being in fact promoted by a body called the Church Association.

The Bishop of Gloucester and Bristol, in whose diocese the offences were alleged to have been committed, refused to hear the objections, and thereupon Mr. Edwards applied in the first instance to Bacon, V.C., and by way of appeal from him to the Court of Appeal in Chancery, for a prohibition to restrain the issuing of a commission and of any proceedings thereunder, until the bishop should have heard and determined the objections. The Court was composed of Lord Selborne, and Mellish, L.J., and in the course of his judgment, refusing the application, Lord Selborne said: "The statute imposes upon the bishop the duty of issuing, *in what he may consider a proper case,* a commission of inquiry; and in the language of the statute he may do so either upon the application of any party complaining of an offence alleged to have been committed, or if he shall see fit of his own mere motion. I have a very serious doubt *whether it would be competent for the bishop to refuse to entertain and consider an application proceeding from any party,* because the statute says that *any* party who thinks fit to do so may make the application. *But doubtless it is for the bishop to exercise a discretion whether he will or will not issue a commission,* either when he has received the application from any party, or

(1) Law Rep. 3 P. C. 245. (2) Law Rep. 9 Ch. 138.

when he might do so upon his own motion." Mellish, L.J., however, expressed himself upon this point in the following manner: "I will assume *what is not quite certain*, on the construction of the section, that the bishop has a discretion, *on account of the character of the promoter*, to refuse to issue a commission; I say it is not quite certain, because the words are 'it shall be lawful for the bishop,' and these words are very often considered to be compulsory." In the result Lord Selborne being of opinion that the bishop had a discretion as to the issuing of a commission, and Mellish, L.J., assuming that he had such discretion, though not then prepared to express a positive opinion to that effect, held that the accused party had no right, at that stage of the proceedings, to insist upon being heard.

I believe that I have now referred to all the authorities upon the question of the construction of the third section of the Church Discipline Act, to which our attention has been directed in the course of the arguments on these appeals; and, such has been the diligence of the counsel engaged, that I have been unable to find any other authority than those which have been mentioned by them: it remains for me to express my opinion upon their effect.

Now, whatever weight is to be attached to the other authorities, there is in the case of *Elphinstone* v. *Purchas* (1) a distinct declaration by the Judicial Committee of the Privy Council, the ultimate Court of Appeal in matters ecclesiastical, that the bishop has full control in limine over the subject-matter of criminal ecclesiastical suits, and that such suits ought not to be allowed, unless he is of opinion that the public interest requires their institution. I am not prepared to say that the decisions of the Judicial Committee are, in all cases, binding upon the different Courts of which the Supreme Court of Judicature is now composed; it is not necessary to say so to support the opinion which I am about to express; but, having regard to the emphatic language in which the views expressed by Wightman, J., in *Reg.* v. *Bishop of Chichester* (2) were adopted in the judgment in *Elphinstone* v. *Purchas* (1), and to the fact that, during the ten years which preceded the judgment in *Elphinstone* v. *Purchas* (1), such views were generally accepted, and that in the ten years which have

(1) Law Rep. 3 P. C. 245. (2) 2 E. & E. 209.

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elapsed since that judgment no judicial dissent from it was expressed until the judgment from which these appeals are brought, I should be prepared to hold, and, so far as my individual opinion is concerned, I do hold that the substantial question involved in these appeals, namely, the question whether, according to the true construction of the third section of the Church Discipline Act, the bishops have or have not the discretion claimed for them, has been conclusively settled in the affirmative by authority. It is somewhat singular that, although the judgment of the Judicial Committee in the case of *Elphinstone* v. *Purchas* (1) was referred to in the judgment of the Queen's Bench Division as bearing upon the question of the practice before the Church Discipline Act in suits in which the office of the judge was promoted, the attention of the learned judges does not appear to have been directed to its bearing upon the question of the construction of the third section of that Act.

Before leaving the subject of judicial authority as bearing upon the question of the construction of that section, I desire to refer to the circumstance of our having allowed the counsel for the appellants to quote to us a passage from the speech of the Lord Chancellor in the House of Lords, when moving the third reading of the Public Worship Regulation Act in 1874: the counsel for the appellants, whilst admitting that he could not refer to the passage in question, or any other passage in that or any other speech, for the purpose of construing the Public Worship Regulation Act, insisted that it was perfectly open to him to refer to it as representing the opinion of the Lord Chancellor as to the then state of the law relating to proceedings in respect of offences against the laws ecclesiastical, which laws it was proposed to some extent to affect by the Bill before the House. After hearing the objections of the counsel for the respondent, we allowed the passage to be read, and, though I have since entertained some doubts whether we were right in our decision, which doubts have not been wholly removed, I am, upon the whole, of opinion that there was no objection to the course which we allowed the appellants' counsel to take. The question, with reference to which we allowed it to be cited, was whether, at the time of the passing of the Public

(1) Law Rep. 3 P. C. 245.

Worship Regulation Act, there was a general concurrence of judicial opinion as to the true effect of a provision in an Act of Parliament passed thirty-four years previously. The Courts have been in the habit of allowing reference to be made to text-books, the authors of which are living judges, and I am unable to distinguish, in principle, an expression of opinion by the Lord Chancellor as to the state of the law upon a particular subject, with which he is inviting the House of Lords to deal, from an expression of opinion upon the same subject by another judge in a treatise published by him. The weight to be attached to the opinion, whether expressed in the one form or the other, must of course depend upon the surrounding circumstances.

The doubts which I have entertained as to the propriety of our allowing reference to be made to the speech of the Lord Chancellor, have arisen from a consideration of the difficulties, which in some cases may arise, though they do not exist in the present, in the way of strictly limiting the purposes, for which reference may be made to such expressions of judicial opinion. The passage in the Lord Chancellor's speech was in the following terms: "The bishop may commence proceedings either on his own mere motion or on the application of any other person, and the proceedings may be taken, too, without any security being taken for the payment of costs. The bishop may indeed, if he is called on to proceed, for his own protection, ask the person who puts him in motion to give him some security for his costs; but as far as the person proceeded against is concerned, no security whatever can be demanded. Then the bishop has a discretion, as he has under this bill, whether or not he will proceed." The Lord Chancellor next proceeds to point out that, if the bishop proceeds, the first step is to appoint a commission.

Now if the opinion, which I have already expressed, that the question of the construction of the third section of the statute has been conclusively settled by authority, is well founded, it is decisive of the question involved in these appeals, but, having regard to the elaborate and very carefully considered judgment, which has been delivered in this matter in the Queen's Bench Division, and to the circumstance that in that judgment the authorities upon the subject of the construction of the third section

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of the Church Discipline Act, with the exception of *Elphinstone* v. *Purchas* (1), though carefully reviewed, were not considered as conclusive, and bearing in mind also that any uncertainty which may have existed previously to such judgment must of necessity be increased by the opinions expressed in it, I am unwilling to rest my decision in this case upon authority alone; I propose, therefore, to consider the question of the construction of the statute apart from the authority to be derived from the judicial decisions and dicta to which I have referred.

As I have already observed, the question, whether in any particular enactment, the words "*it shall be lawful*," are to be regarded as imperative or as importing a discretion, must depend, not only upon the immediate context, but also upon the object and general scope of the statute; I propose, therefore, to consider this question under the three following heads: first, what inference as to the proper construction of the section is to be drawn from the consideration that the object of the statute was to provide means for ensuring the correction of clerks in holy orders, who had committed offences against the laws ecclesiastical; and, whilst dealing with the question under this head, I shall omit from consideration the means, which were previously in force for effecting the same purpose; secondly, whether the language of the Act, per se, favours the obligatory or the permissive construction; and thirdly, the extent to which the construction of the third section is affected by a consideration of the procedure for the correction of the like offences, which was in force previously to and at the time of the passing of the Church Discipline Act, and to replace which procedure that Act was passed.

Now, under the first of these heads of consideration, a great deal may be said in favour of each of the alternative constructions. It may be urged, as it has been urged with great force, that it is the right of the public, whether clergy or laity, to have the services of the Church conducted in strict accordance with law; but their consciences ought not to be offended, nor the interests of pure religion prejudicially affected, by the preaching or other publication of heretical doctrine, or by unauthorized deviations from the established ritual and ceremonial of the Church of

(1) Law Rep. 3 P. C. 245.

England; that to secure the punishment of such offences as a means of preventing their continuance or repetition is a matter of public interest, and that such punishment cannot be secured, if a power is given to the bishop of interfering with and preventing a prosecution; that bishops, as well as clerks, may have different views upon matters of doctrine as well as in respect of ritual or ceremonial, and that to leave the power of allowing or preventing proceedings to the bishop might, and in the present state of religious opinion probably would, lead to practices being tolerated in one diocese, which were prevented in another. This line of argument is at first sight very forcible, but it is deprived of much of its force, when it is borne in mind that the complaint, upon which it is insisted the bishop *must* act, may be made by any person who cares to intermeddle.

It is impossible to estimate the extent of scandal and mischief, which might be occasioned to the Church, if such unlimited power of initiating proceedings is to be held vested in any one who chooses to exercise it; not only would rival parties in the Church itself be induced to embark in litigation, with the object of obtaining small party triumphs, though at the cost of much injury to the general interests of the Church, but persons of no religious views, without any personal interest in the matter, and actuated possibly by feelings of general hostility to the Church and a desire to bring it into disrepute, might initiate and prosecute proceedings; it cannot but be for the public interest that some check should be interposed upon such useless, not to say mischievous, proceedings; and the argument *ab inconveniente* is strengthened by the consideration that, if a bishop is in all cases bound to proceed upon receiving a complaint, from whomsoever it may proceed, the obligation will be imposed upon him, not only in cases of offences of a serious character, but also in those in which the offence is trivial, or in which the offending party has erred through ignorance or has acknowledged his error and promised to abstain from repeating it, or in which the bishop, from his knowledge both of the accuser and the accused, has every reason to believe that the issuing of a commission would only result in a report that there were no grounds for further proceedings. To the suggestion that the bishops might fail to discharge their duty

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honestly and uprightly, and that unauthorized practices might be allowed or prevented according to the peculiar views of the bishop, it is, in my opinion, sufficient to say that a similar objection might be raised to every discretion vested in persons wielding judicial or quasi judicial authority; if it is found in practice that such consequences ensue, the legislature may safely be trusted to interfere and provide sufficient safeguards for the future. So far, then, as the construction of the third section is affected by considerations arising out of the object for which the Act was passed, I can see nothing to suggest that the words "*it shall be lawful*," as used in the third section, should have other than their primary permissive meaning.

Nor is there, in my opinion, anything in the language of the Act, which, taken per se, suggests that an imperative sense or meaning should be attributed to them; the words repeatedly occur in the several clauses of the Act; in most instances they clearly import discretion; in some they possibly are used in an imperative sense; in the 3rd section, they doubtless *may* have been intended to be so meant and understood, but there is nothing in the immediate context to cause such a meaning to be necessarily attributed to them. Reliance has been placed upon the words "*if they shall think fit*," as suggesting that, while they confer a discretion upon the bishop of proceeding upon his own mere motion, instead of upon the complaint of the person applying to him, they impliedly negative any further or other discretion. I cannot take this view, the words may be superfluous, and similar expressions are to be found in other parts of the Act, where they are clearly superfluous; but I much doubt whether they are superfluous in the 3rd section; in my opinion they strengthen the suggestion that a permissive meaning should be attributed to the words, "*it shall be lawful*."

But I pass on to consider what, at the time when the statute was passed, was the state of the law as affecting prosecutions for ecclesiastical offences, and of the practice in relation to such law. I fully assent to the proposition that, the object of the statute being confined to the introduction of a new procedure for the correction of offending clerks, it is to be assumed, in the absence of any indication to the contrary, appearing in the language of

the statute, or to be reasonably inferred therefrom, that it was not intended by the legislature to extend or abridge the rights, powers or privileges of either the laity or the clergy, in relation to prosecutions for such offences. The application of this principle to the construction of the 3rd section of the Church Discipline Act has been insisted on by both parties to these appeals, though they differ in this that the appellants contend that, before the passing of that Act, the office of the judge could not be promoted without the leave of the Court, which might be withheld at discretion, whilst the respondent insists that the Court had no discretion whatever in the matter, provided the offence charged was one of ecclesiastical cognizance, and the promoter was of means to meet the costs of the proceedings in the event of his failing to support his charge. I proceed to consider the several authorities which have been cited in support of these conflicting views. Reference has been made on both sides to the old text-writers, Clarke, Oughton, and Conset, the two latter of whom substantially quote from or adopt what had been previously written by Clarke, but it does not appear to me, after fully considering the statements of these writers, that such statements amount to more than this, that if a clerk, accused of any offence against the laws ecclesiastical, had not been proceeded against by either of the forms of procedure known as "inquisitio" and "denunciatio," any person who was competent to meet the costs if he failed, was qualified to implore and promote the office of the judge and to require the accused party to answer articles; but it does not necessarily follow, that if the office was implored, leave was, *as of right*, to be given to promote it, though it must be admitted that the language used by those writers is open to the interpretation, which, on the part of the respondent, it is sought to put upon it. Apart from the authority of decided cases, and looking only at the language used by Clarke and his copyists, I should prefer the construction that the writers intended to represent that the prosecution of a clerk for an ecclesiastical offence was not confined to ex officio proceedings by the bishop or archdeacon, but might be promoted *in proper cases* by any other person, layman or clerk who was willing to run the risk of having to pay the costs of the proceedings. But we are not left to the

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dicta of the early text-writers, whose views, as would appear from the observations of Sir William Scott in the case of *Turner* v. *Meyers* (1), to which for another purpose I shall have occasion to refer presently, were not always in accordance with established principles of law; we have judicial authority upon the subject, and to such authority the counsel, as well for the appellants as for the respondent, have referred as supporting the views, for which they respectively contend.

On the part of the respondent, it is urged that the view, for which he contends, is supported by passages in the judgments of Sir George Lee in the case of *Argar* v. *Holdsworth* (2), of Sir William Scott in the cases of *Turner* v. *Meyers* (1), and the *Procurator-General* v. *Stone* (3), and of Sir John Nicholl in the case of *Carr* v. *Marsh* (4), and still more so by the observations of Dr. Lushington, to which attention has already been directed in the case of *Ditcher* v. *Denison*. (5) To what extent, then, do the authorities, so relied upon, bear out the proposition asserted by the respondent, that the promotion of the office of judge was a proceeding, which could be put in force by any one, *as of right?* It is true that, in *Argar* v. *Holdsworth* (2), Sir George Lee said that a clergyman might be prosecuted by any one for neglect of duty; but the suit of *Argar* v. *Holdsworth* (2) was one, which had been instituted against the vicar of a parish in Totness, for refusing to marry the prosecutor, who was a parishioner of the defendant's parish, and had obtained a licence for his marriage from the archdeacon; articles, alleging that the defendant was bound to marry a parishioner upon the production of a legal licence in that behalf, had been allowed by the Court of the archdeacon, had been disallowed, on appeal, by the Consistory Court, and upon such disallowance coming before the Court of Arches, it was objected that the proper remedy was by an action at law for damages; it was in reference to this defence, that Sir George Lee made the observations relied upon by the respondent, and the whole passage in which the words relied upon were used, was as follows: "I said that possibly Argar might have an action for damages; but

(1) 1 Hagg. Cons. Rep. 414.
(2) 2 Phill. Cases temp. Lee, 516.
(3) 1 Hagg. Cons. Rep. 425.
(4) 2 Phillim. 198.
(5) 11 Moo. P. C. 324.

nevertheless the clergyman might be prosecuted by any one for neglect of his duty;" this can hardly be considered as an authority on the one side or the other. Again the passages relied upon in the judgments of Sir William Scott in *Turner* v. *Meyers* (1), and the *Procurator-General* v. *Stone* (2), were in the following terms; in the former he said: "The criminal suit is open to every one, the civil one to every one shewing an interest;" and in the latter: "It is not in the power of the bishop by any intervention on his part, to refuse the process of the Court to any one, who is desirous to avail himself of it *in a proper case*." Thus quoted, these passages appear to support, to some extent, the respondent's contention; but let us examine the circumstances under which these observations were made. In *Turner* v. *Meyers* (1), the suit was a civil one, instituted by a father to annul the marriage of his son on the ground of his son's insanity, and Sir William Scott held that, as it was a civil suit, it was necessary that the promoter should show an interest, which he failed to do, as his son was of full age at the time of the marriage; the statement that the criminal suit was open to every one, was for the mere purpose of distinguishing between a civil suit in which the promoters *must* have an interest, and a criminal suit which could be promoted though the promoter had no interest; the case has no bearing upon the question, whether the leave of the Court for the promotion of the suit could be obtained as of right. And in the case of the *Procurator-General* v. *Stone* (2), the promoter, who after citation had appeared in person, but under protest, objected at the hearing that the Procurator-General was not qualified to be a promoter of the suit, and it was to this line of defence, as would appear from what follows in the judgment, that Sir William Scott referred.

I do not gather from the reports that in either of these cases any questions arose as to the necessity for obtaining leave to promote the suit, or as to the circumstances under which such leave was granted; but I should infer from the course pursued by the same learned judge in the cases to which I am about to refer, that leave had been applied for and obtained in both. In the case of *Duke of Portland* v. *Bingham* (3), which came before Sir

(1) 1 Hagg. Cons. Rep. 414. (2) 1 Hagg. Cons. Rep. 425.
(3) 1 Hagg. Cons. 209.

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William Scott some years previously to *Turner* v. *Meyers* (1), that learned judge directed attention to the non-observance of the rule in Ecclesiastical Courts, that when the office of the judge was promoted by any private individual, a personal application should be made to the judge in the presence of the registrar, in order that it might appear in the minutes of the court, and he gave notice that for the future the Court would hold any omission to observe that rule fatal; and, accordingly, in the first suit of *Maidman* v. *Malpas* (2), the accused party was dismissed in consequence of leave not having been obtained for the promotion of the suit. And, in giving judgment in the second suit between the same parties (3), Sir William Scott used the following language, which has been frequently quoted and approved of on subsequent occasions: "The leave of the Court should be first obtained, *since it is a part of the ecclesiastical jurisdiction, which is not to be exercised* WITHOUT DISCRETION, *or to be left entirely to the judgments or passions of private persons.*"

Now the passages, to which I have just referred, in the judgments of Sir William Scott in the case of *Duke of Portland* v. *Bingham* (4) and the two cases of *Maidman* v. *Malpas* (2) appear to me to explain and illustrate the state of the practice as Sir William Scott found it and as he left it; from the time of the Reformation the rule had been that leave should be obtained for the promotion of the office of the judge, but the observance of such rule had been neglected for many years. In *Duke of Portland* v. *Bingham* (4) Sir William Scott drew attention to this neglect, but, in consequence of the practice having fallen into desuetude, he did not punish the then promoter, but gave warning that for the future any similar neglect would lead to the dismissal of the suit. The first suit of *Maidman* v. *Malpas* (2) having been commenced without leave, was for that reason dismissed; and in the second, which had been promoted after leave had been obtained, he referred to the former suit and assigned the reasons for the existence and enforcement of the rule. In the case of *Carr*

(1) 1 Hagg. Cons. Rep. 414.

(2) See note to *Maidman* v. *Malpas*, 1 Hagg. Cons. Rep. 209.

(3) See judgment of Sir William Scott in second suit, 1 Hagg. Cons. Rep. 209.

(4) 1 Hagg. Cons. Rep. 209.

v. *Marsh* (1) the proceedings were against a clerk for officiating in a chapel without the authority of the incumbent; he pleaded the licence of the bishop, and insisted that the office of the judge ought not to be promoted against him in the court of the bishop, whose licence he held. In overruling this objection, Sir John Nicholl said: "Application is always made to the judge before a citation is issued in a cause in which the office is promoted; but that is not for the purpose of considering the merits of the case, but the nature of the suit, whether it be of ecclesiastical cognizance, or the fitness of the person to be made responsible for costs to the other party." These observations of Sir John Nicholl, if they are to receive their strict interpretation, undoubtedly support the respondent's contention, that if the offences charged were of ecclesiastical cognizance, and the party applying was of ability to defray the costs, the granting of leave to promote the suit was *of right;* but the views so expressed are at direct variance with those expressed by Sir William Scott in *Maidman* v. *Malpas* (2), and they are inconsistent also with the judgment of Sir John Nicholl himself in the case of *Lee* v. *Matthews* (3), which came before him some fourteen or sixteen years later; in that case, which was a suit for brawling, Sir John Nicholl said: "This being a case of office, the whole transaction should have been fairly and candidly stated at once, in order that the judge might have an opportunity of considering whether, both parties being involved in pari delicto, *he ought to allow his office to be promoted.*" Again, in the case of *Sherwood* v. *Ray* (4), before the Judicial Committee of the Privy Council in 1837, and which was the last case upon the subject before the passing of the Church Discipline Act, the suit, which was a civil one, had been instituted by a father to set aside the marriage of his daughter as incestuous, and the objection raised was that the father had no sufficient interest to maintain the suit. The lords present were Lord Brougham, Baron Parke, the then judge of the Court of Bankruptcy, and Sir John Nicholl; and Baron Parke, in delivering the reserved judgment of the Committee, observed as follows: "It is to be recollected that this may be the only form in which any individual can question the marriage

(1) 2 Phillim. 198.
(2) 1 Hagg. Cons. Rep. 209.
(3) 3 Hagg. Ecc. Rep. 169.
(4) 1 Moo. P. C. 353.

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as a matter of right; for to promote the office of judge in a criminal suit requires the authority of the Court, and *though this is obtained without difficulty in ordinary cases, it cannot be obtained ex debito justitiæ.*" The learned judges of the Queen's Bench Division appear to have treated this authority as of little weight, because the question whether leave to promote the office of the judge could be demanded as of right was not the point to be determined in the suit, and had not been adverted to in argument. I cannot take the same view of the weight to be attached to this statement; it is doubtless true that the question was not the point to be determined and had not been adverted to in argument, but the necessity for obtaining the authority of the Court to promote the office of the judge in a criminal suit was assigned in the judgment as *a reason, if not the substantial reason*, for holding that the father had a right to prosecute the civil suit, as otherwise the father, or any other person interested, might have had no means of questioning the validity of the marriage. And the observations which I have just quoted from the judgment of the Judicial Committee in *Sherwood* v. *Ray* (1) were referred to as expressing the state of the law and practice in relation to the promotion of the office of judge in the passage which I have already cited from the judgment of their Lordships in *Elphinstone* v. *Purchas.* (2)

It remains only to notice the observations of Dr. Lushington in the case *Ditcher* v. *Denison* (3): I have already quoted them in detail, being desirous of accurately pointing out the line of reasoning adopted by him. It is clear that he founded the views then expressed by him upon the language which he quoted from Sir William Scott's judgment in *Procurator-General* v. *Stone* (4) and upon the observations of Sir John Nicholl in *Carr* v. *Marsh* (5); I have just directed attention to the circumstances under which these observations were made by Sir William Scott and Sir John Nicholl in the two cases referred to, and have pointed out how little such observations can be regarded as indicating the matured opinions of these learned judges upon the question we are now considering. The views expressed by Dr. Lushington are at all

(1) 1 Moo. P. C. 353.
(2) Law Rep. 3 P. C. 245.
(3) 11 Moo. P. C. 324.
(4) 1 Hagg. Cons. Rep. 425.
(5) 2 Phillim. 198.

times deserving of the most respectful consideration, but they lose much of their importance when, as in the case of *Ditcher* v. *Denison* (1), they have evidently been founded upon an erroneous appreciation of what he regarded as authorities binding upon him. The circumstances of some of the cited authorities rendered it necessary for the counsel for the respondent to admit the possibility of the Court having some further jurisdiction in respect of the refusal of leave to promote the office of the judge than that of determining whether the offences charged were of ecclesiastical cognizance and ascertaining the competency of the proposed promoter to meet the expenses in the event of his failing to establish the charges preferred by him. For instance, the case of *Lee* v. *Matthews* (2) compelled them to admit that the judge might have to consider whether in a case in which both parties were in pari delicto he ought to allow his office to be promoted; and it is difficult to understand why, if the Court had a discretion to refuse to allow the office of the judge to be promoted on account of the proposed promoter being in pari delicto with the accused party, there should not have been a like discretion in respect of any other unfitness of the party complaining. Again, it was hardly disputed that there must have been a discretion somewhere to prevent the promotion of frivolous and vexatious suits, and that such discretion could not well have been vested elsewhere than in the judge; such a discretion must necessarily be a very wide one, and, if this extent of discretion in respect of the granting or refusing leave to promote the office of the judge is once recognised, it is difficult, if not impossible, to place limits upon it. Upon the whole, then, after a full consideration of all the authorities cited, I have arrived at the conclusion that when proceedings, by way of promoting the office of the judge, were first introduced, such promotion could only take place with the leave of the Court; a leave rarely refused in a proper case, but of the propriety of interfering in each case the Court was the only judge; that in the somewhat lax proceedings of the seventeenth and eighteenth centuries the application for leave fell into disuse, and the office of the judge was ordinarily promoted, without the leave of the Court being granted or even applied for; that Sir William Scott, being influenced probably by

(1) 11 Moo. P. C. 324. (2) 3 Hagg. Ecc. Rep. 169.

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the circumstances of some one or more of the cases which came under his consideration, appreciated the evils which had arisen, and might arise again from neglecting that which he described as a rule and as "part of the ecclesiastical jurisdiction," and insisted upon its observance for the future, as a check upon proceedings which might otherwise have their origin in "the passions of private persons;" and that such rule, so reinstated by Sir William Scott, continued in force and was recognised as in force down to the time of the passing of the Church Discipline Act in 1840.

This being so, I can come to no other conclusion upon the question of the construction of the third section of that Act, than that the authority thereby conferred upon a bishop, of issuing a commission, is one which, when complaint is made to him, he may put in force, or abstain from putting in force, according as he, in the exercise of his discretion, and having regard to the circumstances of each case that may be brought under his consideration, may think fit.

Upon both grounds, then, upon the ground that the question of construction has been settled by authority, and upon the ground also of the independent judgment formed by myself upon the same question, I am of opinion that when complaint was made to the Bishop of Oxford by Dr. Julius, he, the bishop, had a discretion, in the exercise of which he was at liberty to abstain from taking either of the proceedings referred to in the order of the Queen's Bench Division, that the Queen's Bench Division consequently had no jurisdiction to interfere, and that the rule for a mandamus must be discharged.

With respect to the question of the costs, I see no reason why the ordinary rule should not be followed. Whether the bishop exercised his discretion wisely or not, is a question which, with all respect for the views expressed by Bramwell, L.J., is not in my opinion for our consideration to-day; the mandamus was applied for and supported on the ground, that the bishop under the circumstances of the case had no discretion to refuse to issue a commission, and the answer of the bishop was that he had a discretion, which it was not within the jurisdiction of the Queen's Bench Division to control. To have entered into evidence for the purpose of shewing that he had exercised his discretion wisely,

would have been foreign to the real question raised. I am far from suggesting that such circumstances existed in the present case, but I can well understand that there might be circumstances in addition to those, which for the purposes of these appeals must be treated as having existed, which would lead me to regard the refusal of the bishop to issue a commission as a course taken by him in the best interests of the Church and of religion. But I do not think that there should be two sets of costs. The appeals ought to be allowed, but only one set of costs ought to be given.

THESIGER, L.J. I concur in the conclusions at which the other members of the Court have arrived; but as they involve a reversal of the judgment of the Court below, and the case is one of importance, I think it desirable I should state in my own language the grounds upon which my opinion rests.

A considerable amount of time was occupied during the discussion of the case in this Court in tracing to its origin, and following throughout its course down to the passing of the Church Discipline Act, the position, in regard to the prosecution of ecclesiastical offences, of the bishop and his court. The à priori argument which this historical investigation is intended to found is not conclusive; but still the result of the investigation must necessarily be to throw some light upon the question for decision, and it therefore demands consideration. It starts with these undisputed facts. The bishop's court had existed from the earliest times, and obviously must have taken its rise from the bishop's pastoral authority over his diocese. The procedure in the bishop's court in criminal suits, whatever might have been its original shape, had long settled down into a form under which the proceedings were in theory instituted by the bishop himself "ex mero motu," or "ex officio promoto." The bishop himself had long ceased to sit in his court, having delegated his authority in this respect to a judge, whose office in technical language was "implored," when a private party desired to institute criminal proceedings. From very early times an appeal appears to have lain from the bishop to his metropolitan, who at the same time had also a concurrent original jurisdiction. The latter jurisdiction it was the main object of the Statute of Citations (23 Hen 8,

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c. 9) to curtail; but while that Act left the archbishop very little of his concurrent jurisdiction, it preserved the appeal to him from the bishop, and gave him original jurisdiction, to use the language of the Act, "in case that the bishop or other immediate judge or ordinary dare not or will not convent the party to be sued before him." By the 25 Hen. 8, c. 19, a further appeal for lack of justice at or in any of the courts of the archbishops, was given to the King's Majesty in the King's Court of Chancery, to be determined by commissioners appointed under the Great Seal, in like manner as appeals from the Admiralty Court were determined. In this manner, and apparently without the possibility of interference on the part of the temporal Courts, so long as the bishops did not exceed their jurisdiction, the matter stood down to the passing of the existing Act of Uniformity (1 Eliz. c. 2). By it uniformity in the performance of divine service and in the administration of the sacraments was prescribed, and archbishops, bishops, and other ordinaries were required and charged to enforce the Act in language which, so far as it goes, certainly tends against the view that at that time they were under any absolute obligation to allow their office to be promoted in cases of ecclesiastical offences, or that parliament intended them to be placed in such cases under any obligation which could be enforced by the temporal Courts. It is only, to use the words of the Act, in "God's name," and "as they will answer before God for such evils and plagues wherewith Almighty God may justly punish his people for neglecting this good wholesome law," that they are earnestly required and charged to endeavour themselves to the uttermost of their knowledges that the due and true execution of the Act might be had throughout their diocese and charges. And while the Act gave jurisdiction to the temporal Courts in respect of offences under it by enabling justices of oyer and terminer and justices of assize upon indictment to try such offences, it is observable that even there the legislature appears to have recognised the rights of the bishop and his pastoral authority and power by authorizing him to associate himself with the justices at the trial.

Pausing for a moment at this point, and without expressing any confident opinion upon the subject, I would say that apart from

the authorities, the origin and character of the bishop's jurisdiction, the form of the procedure in the criminal suit to which he was in theory a party, and which was commenced by imploring his office, or the office of his judge, the appeals which under the Statute of Citations were open to parties where the bishop would not or dared not convent persons accused, and the language used in the Act of Uniformity convey to my mind a strong impression that the bishop by himself or by his judge possessed at the time of and after the passing of the last-mentioned Act a discretionary power of refusing to allow the process of his court to be set in motion in respect of ecclesiastical offences. Both appellants and respondents however place reliance upon the decisions and dicta of judges in cases where this point was directly or indirectly raised. At first sight it appears difficult to arrive at any very certain conclusion from the perusal of these cases. The strong observations of Sir William Scott, *Maidman* v. *Malpas* (1) are met with the equally strong observations of Dr. Lushington at Bath in the case of *Ditcher* v. *Denison* (2). Sir John Nicholl, in *Lee* v. *Matthews* (3), is supposed to be answered by himself in the previous case of *Carr* v. *Marsh* (4), and the cases of *Argar* v. *Holdsworth.* (5) *Procurator-General* v. *Stone* (6), and *Turner* v. *Meyers* (7), in which dicta are to be found tending to the effect that the right to institute a criminal suit in the Ecclesiastical Courts was an absolute one open to any private person and with which the bishop could not interfere, are properly subject to the remark which was made upon them in the Court below, viz., that they "were incidentally made and were not necessary to the decision of the cases in which they were pronounced," and against these dicta is to be set the very distinct statement of Parke, B., when delivering the judgment of the Privy Council in *Sherwood* v. *Ray* (8), that "to promote the office of a judge in a criminal suit requires the authority and consent of the Court, and though this is obtained without difficulty in ordinary practice, it cannot be demanded ex debito justitiæ."

(1) 1 Hagg. Cons. Rep. 205, 209.
(2) 11 Moo. P. C. 324.
(3) 3 Hagg. Cons. Rep. 169.
(4) 2 Phillim. 198.
(5) 2 Phill. Cases temp. Lee, 515.
(6) 1 Hagg. Cons. Rep. 424.
(7) 1 Hagg. Cons. Rep. 414.
(8) 1 Moo. P. C. 353.

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But while upon a cursory examination of the cases, they may appear to shed a doubtful light upon the question under consideration, when they are more carefully examined as they have been by Baggallay, L.J., in his judgment, I think that the current of authority manifestly supports the view expressed in *Sherwood* v. *Ray*. (1) Passages in text-books, which may all be traced back to an original passage in Clarke's Praxis, s. 322, "modus procedendi per accusationem" cannot, even if they were more favourable than they are to the opposite contention, be relied upon to negative a discretion, which decided cases prove to have at least to some extent actually existed. But, in truth, it appears to me that there is a mode by which the apparently conflicting views expressed upon this point either in text-books or in decided cases may be reconciled. The bishop or his judge had, I conceive, a real discretion in the matter of allowing a criminal suit to be instituted; the application for leave to promote the office of the judge was not a mere matter of form, or for the purpose merely of the judge seeing that the offence charged was of ecclesiastical cognizance and the party applying a fit person as regards solvency, but was, as Sir William Scott stated in *Maidman* v. *Malpas* (2), for the purpose of preventing the exercise of his jurisdiction being left entirely to the judgment or passions of private persons; but on the other hand the ecclesiastical judges, while they enforced the necessity of the applications, would naturally act upon fixed principles of practice: they would, as lawyers, apply to ecclesiastical offences the principle that it is the interest of the State that offences should be punished, and as a general rule of action, although not an invariable one, as pointed out by Sir John Nicholl in *Lee* v. *Matthews* (3) they might, as the same judge said in *Carr* v. *Marsh* (4), merely consider the nature of the suit whether it was of ecclesiastical conusance and the fitness of the person applying to be made responsible for costs to the other party. There would thus be on the one hand in the judge and as between him and any interference on the part of the temporal Courts an absolute discretion to allow or not to allow his office to be promoted in criminal suits; there would be, on the other hand,

(1) 1 Moo. P. C. 353.
(2) 1 Hagg. Cons. Rep. 205.
(3) 3 Hagg. Cons. Rep. 169.
(4) 2 Phillim. 198.

in his court, as a matter of its internal economy, a practice which might be moulded from time to time to meet the exigencies of the case, and by which his judicial discretion would, as between him and the suitors of the Court, be regulated. I am confirmed in this view of the position of the bishop and his judge prior to the Church Discipline Act, by the observations upon the point to be found in the judgment of the Privy Council in *Elphinstone* v. *Purchas.* (1)

Assuming then the view I have expressed to be correct, the argument is pertinent that the legislature would not be likely, looking to the object of the Church Discipline Act, to make such an important and serious change as that of enabling any private person wherever resident, whatever might be his real motives in prosecuting, however undesirable it might be in the particular instance that a prosecution should be instituted, and upon mere rumour, as well as specific charge, to demand for the purpose of such a prosecution that the machinery of the bishop's court, which hitherto had only been open to him at the discretion of the bishop or his judge, should be put in motion. The institution of the commission of inquiry does not really meet this objection, for it is manifest, when the language of the 3rd and 4th sections of the Act is looked at, that the functions of that commission are not of a discretionary character, but are analogous to those of a grand jury upon a bill of indictment.

But although the argument is pertinent it is not conclusive, for it may be said that if the leave to promote the office of the judge was not before the Act "ex debito justitiæ," still it was granted by the bishop's judge according to fixed rules of practice, and therefore the legislature might possibly determine to sweep away any discretionary power of refusing such leave when passing an Act which again constituted the bishop the judge in his own court, and interposed between an accused clerk and his accuser at least some protection in the commission of inquiry. Under these circumstances I prefer in approaching the construction of the Church Discipline Act, not to weigh very much upon the argument drawn from the discretion which I consider the judge of the bishop's court possessed before the Act. I would press it only to

(1) Law Rep. 3 P. C. 245, 254.

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this extent, viz., that no presumption in favour of the absolute right of a private person to institute proceedings for ecclesiastical offences can be imported into the construction of the Act in the face of that pre-existing discretion.

The language, however, of the 3rd section of that Act, read according to its natural and grammatical signification, points, in my opinion, strongly to the conclusion that a discretion has been preserved by the Act. The words "it shall be lawful," are the governing words of the section, and those words, when used in a statute, primarily import that something to be done, which but for the statute would be contrary to or at least unauthorized by law, has given to it a legal sanction or effect. But such words may, either from the nature of the act to which they refer, if the context will permit of it, or from the context itself, acquire a secondary meaning under which the thing to be done becomes obligatory. As regards the nature of the act, if it be for the public benefit or in advancement of public justice, it is an axiom, as Coleridge, J., in *Reg.* v. *Tithe Commissioners* (1) says, "that words only directory, permissory, or enabling, may have a compulsory force." But the question at once arises whether the thing to be done in this case, the issuing by the bishop of the commission, is "for the public benefit," or "in advancement of public justice," in the sense in which those expressions are used in the axiom just quoted, and if so, whether further it is of such a character as that permissive words not only "may" but must be read as having a compulsory force. Upon neither of these points do the cases cited in the Court below, as illustrations of circumstances in which the axiom had been acted upon, appear to me to afford any real assistance. They were all cases of a very different kind to the present, and indeed this case is of so special a character, that it must, as it seems to me, almost of necessity be decided upon considerations peculiar to itself. As tending against the view that the axiom is to be applied to this case, these considerations may be urged: 1st. The act to be done is not a judicial one. Neither it nor any of the proceedings under the Church Discipline Act, down to and inclusive of the report of the commissioners, is, as the Privy Council said in *Ditcher* v.

(1) 14 Q. B. 459, 474.

Denison (1), under the statute "a suit, or the commencement or any part of a suit." 2ndly. The choice of the bishop in whose diocese the offence is alleged to have been committed as the person to receive the application, to set on foot the inquiry, and to select the commissioners, points to action on his part in his pastoral capacity, and suggests an incongruity in the idea of a temporal Court compelling him to exercise his authority, although it might well prohibit him from exceeding it. 3rdly. The fact that no form or mode by which the application is to be made to the bishop is prescribed, seems to involve the idea that he would in the exercise of his pastoral authority be able for himself to regulate these matters, and indicates therefore to some extent a discretionary power, the limits of which, if it had been intended that the power should be limited, one would have expected the legislature to lay down. 4thly. The benefit to the public of an absolute power in any person to set on foot upon mere allegation of scandal, as well as upon specific allegations of fact, an inquiry into any clergyman's conduct, is, to say the least, doubtful. The judgment in the Court below puts forward in powerful language the reasons which tend in a contrary direction; but it seems to me, with deference, that those reasons are too exclusively drawn from the consideration of the rights of parishioners in regard to offences against ritual, which it must be recollected had not, in 1840, when the Church Discipline Act was passed, assumed so important an aspect as at the present time, and that they give too little weight to considerations arising out of the far more numerous classes of offences to which the Act applies, and which might be made the subject of undesirable as well as of unfounded prosecutions.

But even if the reasons for construing the words "it shall be lawful" as peremptory were stronger than they are, I think that the context affords a strong argument against so construing them. The question is whether the words "it shall be lawful for the bishop," are to be read as meaning "the bishop may" or "the bishop must." If they are read as meaning "the bishop may," they are suitable to the whole sentence which they govern, for it is a correct although redundant expression to say,

(1) 11 Moo. P. C. 324, 341.

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"the bishop may, on the application of any party complaining, or, if he shall think fit, of his own mere motion, issue a commission;" but if they are to be read as meaning "the bishop must," they do not properly fit in with a part of the sentence, for it is certainly not an apt expression to say "the bishop *must, if he shall think fit,* of his own mere motion issue a commission." The section, therefore, in the latter case would have to be construed as if the expression "it shall be lawful" had two different meanings when applied to the two limbs of the following sentence. The words "if he shall think fit" do not really qualify the expression "it shall be lawful;" but merely introduce an alternative mode of action in the case of a supposed offending clerk. This may be more clearly seen by transposing the parts of the section in a way that does not alter its sense, i.e., by reading it as if it ran "It shall be lawful for the bishop to issue a commission on the application of any party complaining, or if he shall think fit of his own mere motion." The obligatory force of the section, if it exist at all, must rest in the expression "it shall be lawful" unaided by any argument to be derived from the supposed qualifying words "if he shall think fit," and for the reasons I have given I think that the reading of the section, which would give that expression an obligatory force, can only be adopted by doing a violence to the structure of the sentence in which it occurs, and to the natural and grammatical meaning of the language used which the strongest reasons alone could justify. But putting the case of the respondent as high as it can be put, it cannot, in my opinion, be justly said that the intention of the legislature to negative all discretion on the part of the bishop is so plain that, to effectuate that intention, a forced construction of the language used in the 3rd section is to be adopted. Before leaving the section I would further observe that in it may be found proof that the draftsman had a clear mode of expressing his meaning when any act was to be made obligatory, for in the proviso under which notice is to be given to the party accused of the intention to issue a commission, the expression "shall be" is substituted for "it shall be lawful."

But as bearing upon the construction of the 3rd section of the Church Discipline Act, we have had addressed to us, by counsel on both sides, many arguments derived from the language or

matter of other sections of the Act. In many sections the expression "it shall be lawful" is used, and comments upon its meaning have been made. That it is, as argued by the appellants' counsel, used in all these other sections merely in a permissive sense is at least not sufficiently clear to allow of any certain inference as to its meaning in the 3rd section being drawn. All that can be said with certainty is, that it is used in some sections in that sense, and therefore is not an expression exclusively appropriated by the draftsmen of the Act to the imposing of an obligation. Reliance, however, has been placed on the part of the respondent upon the obligation which it has been held (and I assume, for the purpose of argument, validly held) is imposed upon the bishop after the commission has reported that there is a primâ facie case, to take the proceedings mentioned in the 9th section. It is pointed out that in that section the same expression "it shall be lawful" is used. The conclusion, however, drawn by the respondent that the expression in itself has a peremptory force in the 9th section is not a valid one, for the 7th section enacts that, upon the commissioners' report that there is a primâ facie case, "if the bishop of any diocese within which the party accused may hold any preferment, *or the party complaining* shall thereupon think fit to proceed against the party accused, articles *shall be* drawn up and filed," and the 8th section enacts that a copy of the articles *shall be* forthwith served upon the party accused. The suit is thus instituted, and s. 9 only provides the machinery for the conduct of that suit. The argument, therefore, may be turned against the respondent, for it may be said that in ss. 7 and 8, as in the proviso to s. 3, where obligation is intended the Act uses expressions which are clearly in form peremptory, and the fact that when a suit is once set in motion the bishop has no right to stop it is no argument against his power to prevent the suit being instituted at all.

I pass from the consideration of the form of these sections to a matter of substance to which the appellants' counsel have referred which is worthy of notice. The 3rd section of the Act relates equally to clerks with and without preferment, and the obligation upon the bishop to issue a commission, if it exist at all, must exist as regards both classes of clerks. But assuming it so to exist, it

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is said that this strange anomaly would arise in the case of a clerk holding no preferment. If in such a case the commission report that there is sufficient primâ facie ground for instituting further proceedings, there is no machinery for instituting such proceedings in any bishop's court, for ss. 7 and 9 only relate to a clerk who has preferment, and give jurisdiction to the bishop in whose diocese the party holds preferment, while on the other hand although in the case of an accused clerk having no preferment s. 13 enables the bishop of the diocese within which the offence charged is alleged to have been committed, to send the case by letters of request to the Court of Appeal of the province, it does so in language which is admittedly permissive only. The apparent anomaly thus pointed out is naturally relied on as an additional argument in favour of the view that the issuing of a commission is a matter of discretion, and not of obligation. But I do not myself lay any stress upon this argument, for whether there is or is not a discretion under s. 3, the anomaly, if it can be called such, would still remain that a clerk without preferment cannot be prosecuted in any bishop's court; and it is possible, and I think from the frame of some of the sections of the Act probable, that the introduction of two different bishops at different stages of the proceedings against an accused clerk may have led to the anomalous position of a clerk without preferment escaping attention in the passage of the Church Discipline Bill through parliament.

In short, the result of my consideration of the different sections of the Church Discipline Act other than the 3rd section is that the argument drawn from their form or matter are either too minute or too doubtful to be of much aid in the construction of the latter section, and I would only say of them that they at least do not in any way displace the view which I have already expressed upon the language of that section standing by itself. I may make the same observation upon the Public Worship Regulation Act, 37 & 38 Vict. c. 85, which has also been imported into the discussion. I cannot think that that Act makes the question clearer, except perhaps so far as it indicates that in certain matters of ritual the legislature did not, while granting a simple machinery for the prosecution of offences, think that the right of parishioners, or even

of persons clothed with special authority, and with all the insignia of respectability, to institute criminal proceedings was of such a kind as that the bishop in his pastoral capacity should not have a power to put a veto upon its exercise.

In this respect, therefore, the later Act strikes a blow at the argument founded upon the supposed improbability of the legislature clothing the bishop under the earlier Act with a discretion to prevent persons instituting proceedings; but it goes no further, and cannot be legitimately pressed as an argument that under the earlier Act the bishop in fact and law had a discretion which, in the case of a simpler machinery, and in the absence of the protection of the commission of inquiry, the legislature thought proper to give.

Putting aside these minor arguments as affording but small, if any, aid in solving the question before us, I come to the important point of the authorities under the Church Discipline Act. Each decision, each dictum, which has been cited in favour of the view that the 3rd section of the Act gives a discretion to the bishop, and does not impose a duty which can be enforced by writ of mandamus, has been subjected to the most searching criticism; but no criticism can displace this fact, that from a time not long after the passing of the Act down to the time when the decision of the Court below was pronounced, there has been the strongest preponderance of judicial opinion on the side of those who maintain the existence of the bishop's discretion. The cases which bear out this statement have been so fully dealt with by Baggallay, L.J., that I do not propose myself to discuss them. I would only say that, among the authorities upon which I rely, I do not count the speech of the Lord Chancellor in the House of Lords. I was a party to the decision under which it was allowed to be quoted to us, and the ground upon which I thought it admissible was that it had, in the occasion upon which it was spoken and the position of the speaker, at least as great a sanction as the text-books of living judges, which have upon many occasions been admitted as authorities.

But upon further consideration of the matter I have been led to doubt very much whether the principle upon which such text-books have been treated as authorities is a sound one; and even if

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it were a sound one, I cannot but think the extension of it to speeches in a house of parliament sitting in its legislative capacity, however eminent may be the speakers, however solemn the occasion on which they speak, inexpedient in a very high degree. It is true that in many instances, and perhaps this particular one is a conspicuous example, the speech, looking to the circumstances under which it is made, the previous consideration which the speaker has given to the subject, and the character in which he speaks, may be entitled to far more weight than the hasty utterances of a judge at nisi prius, or even the obiter dicta of a judge in banco; but the judge in the latter cases has the safeguard of a judicial proceeding cast around him; his mind is not likely to be influenced by any considerations beyond those which the law enforces upon him; while when the scene is removed to the area of parliament, political considerations may enter, as they have before now entered, into the opinions of lawyers upon legal subjects, and may insensibly affect the judgments of even the greatest and wisest of our judges. The sanction and safeguard of judicial procedure are removed, and even the conditions which give the text-book its weight, the exclusive devotion to the legal subject of which it treats, and the calmness with which it is necessarily prepared, may in many instances not exist. It is to be observed, however, that the Lord Chancellor was one of the members of the Privy Council who took part in the case of *Elphinstone* v. *Purchas* (1), and, even excluding his very weighty authority altogether, there is still left a body of judicial opinion in favour of the view that the bishop has a discretion whether he will or not issue a commission of so strong a kind that, if at this late period it is to be overruled at all, it should, in my opinion, only be overruled by the ultimate tribunal of appeal.

Against it, if the judgment appealed from be excluded can be set only; first, the dictum of Dr. Lushington in *Ditcher* v. *Denison* (2) in a judgment in respect to which the Privy Council when it was before them in a subsequent stage of the proceedings, stated that it seemed "to be a just inference that the judge was precluded from taking time for deliberation;" secondly, the expres-

(1) Law Rep. 3 P. C. 245. (2) 11 Moo. P. C. 324.

sion of a doubt of Hill, J., in *Reg.* v. *Bishop of Chichester* (1), immediately followed by a statement of the learned judge that he gave no opinion upon the point which had raised the doubt; and thirdly, what has not inaptly been described as a half doubt of Mellish, LJ., and which really was no more than a guarding of himself against being supposed to express an opinion.

My judgment then upon this case may be summarised thus. Prior to the Church Discipline Act the promotion of the office of the judge was not in theory a matter "ex debito justitiæ," although in practice leave to prosecute for an offence of ecclesiastical conusance may never have as a general rule of practice been refused to a bonâ fide and solvent accuser. The existence of a discretion in the bishop or his judge operates as some check upon unnecessary or undesirable prosecutions, and considering the fact that they may under the Church Discipline Act be based upon alleged scandal as well as specific charges, it is at least not improbable that the legislature would maintain a check which had previously existed, trusting to the bishop exercising his office in the interests of the public order and discipline of the Church. The object of the Act, viz., the amendment of the manner of proceeding in causes for the correction of clerks, renders it at least somewhat improbable that the legislature should make such an important change as that of removing altogether this check, and at least one might expect it to have been made in clear and unmistakeable language. The nature of the Church Discipline Act, its general scope and object, and the particular subject-matter of its 3rd section are not, nor is any of them, of such a character as necessarily to require that the words of that section, if permissive in form shall be construed, as peremptory in fact. The expression "it shall be lawful," in the section is not only in itself in form permissive, but it is coupled with a context, the structure and grammatical signification of which must be altered in order to read the expression as peremptory in fact. Neither the language nor the subject-matter of other sections of the Act afford a valid argument in favour of reading the 3rd section according to any but its formal and natural meaning, and lastly, authority has decided that its formal and natural meaning is its real meaning,

(1) 2 E. & E. 209.

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Thesiger, L.J.

and that the bishop has under the section a discretion with which the temporal Courts have no claim to interfere.

Concurring then with the other members of the Court in the view that the 3rd section of the Church Discipline Act is permissive only, it is unnecessary for me to deal with many questions which have been raised in argument upon the supposition that a contrary view might be entertained: I may say, however, that I agree with the Court below that the Public Worship Regulation Act, 1874, although covering offences which are included in the Church Discipline Act, does not preclude a prosecution for such offences under that Act; and I consider that if the bishop had been subject to the jurisdiction of the temporal Courts in regard to his refusal to issue a commission, there was sufficient ground in the present case for the issuing of the writ of mandamus.

But arriving at the conclusion that the bishop had in the present case a discretion to refuse either to issue a commission or to send letters of request, I am of opinion that the facts stated in the affidavits establish that he has exercised his discretion at least for the time being, and whatever may be my opinion as to the mode in which it has been exercised, I do not conceive it within my province to express it. The legislature has constituted the bishop the arbiter to decide whether or no an ecclesiastical prosecution shall be set on foot within the diocese over which he holds spiritual authority. If appeal from his decision lies at all it does not lie to the temporal Court, and as I have no jurisdiction to interfere with the bishop's decision, I feel it undesirable for me to express an opinion in reference to the grounds upon which it has been based, I would only guard myself against being supposed to differ in any way from the expressions upon this point which have fallen from Bramwell, L.J., and which were made use of in the Court below. I merely refrain from expressing my own opinion. In the result, I arrive at the conclusion that the appeals should be allowed, and inasmuch as the respondent has wrongly invoked the aid of the temporal Court, I think that however proper may have been his motives in his endeavour to institute proceeding against Mr. Carter, and however much one may sympathise with his desire to put down practices alien to the spirit of our Reformed Church, and contrary to the established law of the land, there is no sufficient

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reason for departing from the general rule of this Court, that the successful party should have his costs, and I am of opinion therefore that the appeals should be allowed with costs.

Appeals allowed. (1)

Solicitor for prosecutor: *Girdlestone.*

Solicitors for Bishop of Oxford: *Cunliffe, Beaumont, & Davenport, for T. M. Davenport, Oxford.*

Solicitors for Rev. T. T. Carter: *Brooks, Jenkins, & Co.*

[IN THE COURT OF APPEAL.]

1878
Dec. 3.

BLOUNT *v.* HARRIS.

Bills of Sale Act, 1854 (17 & 18 *Vict. c.* 36), *s.* 1—*Affidavit, Sufficiency of—Attesting Witness—Description of Residence—Erroneous Description.*

In the affidavit filed with a bill of sale pursuant to the Bills of Sale Act, 1854, s. 1, the attesting witness, who was a solicitor carrying on business in the city of London, stated that he resided at "Acton, in the city of London." Acton is in Middlesex, and there is no Acton in the city of London:—

Held, that the residence of the attesting witness was sufficiently stated; for the words "in the city of London" might be rejected, and then it would become clear that Acton, in Middlesex, was the place intended to be mentioned.

APPEAL of the defendant from the judgment of Field, J., on further consideration, after trial in Middlesex without a jury.

The plaintiff claimed certain goods under a bill of sale; the name and residence of the witness were stated in the attestation as follows: "Edward Clarke, solicitor, Bloomfield Street, in the city of London." The affidavit, filed in pursuance of 17 & 18 Vict. c. 36, s. 1, was in the following form: "I, Edward Clarke, solicitor, of 16, Bloomfield Street, in the city of London, make oath and say as follows: I reside at Grove House, Acton, in the city of London." Acton is in the county of Middlesex; there is no

(1) The order of the Court of Appeal directed that the rule of the Queen's Bench Division should be "reversed with costs of this appeal, to be paid by the prosecutor to the" bishop. No provision was made as to the costs of Rev. T. T. Carter.

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place called Acton in the city of London, but in England there are two villages called Acton, one in Suffolk and the other in Cheshire.

The question between the parties was whether the residence of the attesting witness was sufficiently stated in the affidavit.

Wildey Wright, for the defendant. The bill of sale cannot be supported; for the residence of the attesting witness is falsely stated in the affidavit; any mistake as to the residence or occupation avoids the instrument: *Brodrick* v. *Scalé* (1); *Murray* v. *Mackenzie*. (2) This is not an instance of insufficiency of description, such as that which occurred in *Jones* v. *Harris* (3), and which may be corrected by a reference to the bill of sale, nor is it an instance of mere vagueness of statement: *Thorp* v. *Browne*. (4) The object of the Bills of Sale Act, 1854 (5), is to enable it to be easily ascertained whether a person has executed a bill of sale: *Larchin* v. *North Western Deposit Bank* (6); and that object is frustrated by such a misdescription as occurs in the present case. The plaintiff's counsel may rely upon *Hewer* v. *Cox* (7); but that decision is distinguishable, because the city of London may be said to be part of the county of Middlesex, but in no sense can the county of Middlesex be said to form part of the city of London. It has long been settled that an erroneous statement as to the place of abode of a person making an affidavit vitiates it: *Collins* v. *Goodyer*. (8)

(1) Law Rep. 6 C. P. 98.

(2) Law Rep. 10 C. P. 625.

(3) Law Rep. 7 Q. B. 157.

(4) Law Rep. 2 H. L. C. 220, at p. 236, per Lord Colonsay.

(5) By the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), s. 1, "every bill of sale . . . shall, together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same . . . and of every attesting witness to such bill of sale, be filed with the officer acting as clerk of the docquets and judgments in the Court of Queen's Bench within twenty-one days after the making or giving of such bill of sale," otherwise the same shall be void as against execution-creditors and trustees in bankruptcy.

The Bills of Sale Act, 1854, is repealed by the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31); but s. 10 of the latter statute contains similar provisions, the time being reduced to seven days.

(6) Law Rep. 10 Ex. 64.

(7) 3 E. & E. 428; 30 L. J. (Q.B.) 73.

(8) 2 B. & C. 563.

Grantham, Q.C., and *Crispe*, for the plaintiff, were stopped.

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BRAMWELL, L.J. This judgment must be affirmed. I do not think that much assistance is to be derived from the cases which have been cited. The description of the residence of the attesting witness, given in the affidavit, is sufficient, although it is not more than sufficient. "Acton, in the city of London," is an impossible description. It is well known that London is divided into parishes and wards, and Acton is not the name of any parish or ward in that city. The proper interpretation of the description is to reject the words "in the city of London." Then is "Acton" standing by itself sufficient? If the residence of the attesting witness had been Acton in Suffolk, I might have felt a difficulty in upholding the judgment; but Acton, where his place of abode is, lies within Middlesex, the county which adjoins the city of London; and further, he is a solicitor carrying on business in the city of London. If the Bills of Sale Act, 1854, had always been rigorously applied, the result of this case might have been different; but I decide in favour of the plaintiff upon the ground that the error in the description is not calculated to mislead.

BRETT, L.J. I think that this description of the attesting witness is sufficient. The address of the attesting witness set out in the attestation to the bill of sale is "16, Bloomfield Street, in the city of London;" that is correct; and in the affidavit a portion of the description of the residence, namely, "Grove House, Acton," is correct; I feel certain that the test is not whether the description affords the fullest means of knowledge, but whether by the use of ordinary care the person mentioned in the description could be found out and identified. No Acton exists in the city of London, and there is no Acton in Middlesex besides that where the attesting witness resides. There are other places named Acton; but their distance is such that no person could be expected to reside in them, if he carries on business in the city of London. The description is to some extent true, although it is varied by adding something erroneous; it is impossible, however, that the mistake should mislead any one; it is well known that Acton is in Middlesex, and the adding of the words "in the city of London" is

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immaterial. The facts before us resemble those in *Hewer* v. *Cox* (1); in that case the grantors of the bill of sale were described as residing "at New Street, Blackfriars, in the county of Middlesex;" Blackfriars is in the city of London, and cannot be said to be in the county of Middlesex; but the Court of Queen's Bench held that the description was sufficient. That case is almost identical with this, and we ought to treat it as an authority for deciding in favour of the grantee of the bill of sale. I am unable to distinguish *Hewer* v. *Cox* (1) from the present case, and I think that the same principle ought to be applied.

COTTON, L.J. I think that the bill of sale cannot be set aside in favour of the defendant. The question is whether the bill of sale is vitiated as against him by the erroneous words "in the city of London." The description of the residence of the attesting witness cannot possibly be literally true. It can be very easily ascertained by any person of ordinary intelligence that there is no Acton in the city of London. It has been proved that there are more Actons than one in England; but on looking at other portions of the affidavit and of the bill of sale, it is clear that Acton, in the county of Middlesex, is the Acton which it was intended to mention. And the attesting witness does actually reside at Acton, in Middlesex.

Judgment affirmed.

Solicitors for plaintiff: *Noon & Clarke.*
Solicitor for defendant: *G. R. Harrison.*

(1) 3 E. & E. 428; 30 L. J. (Q.B.) 73.

[IN THE COURT OF APPEAL.]

1879
March 27.

LAMB *v.* BREWSTER AND ANOTHER.

Property Tax—Landlord and Tenant—Deduction from Rent—5 & 6 *Vict. c.* 35 —*Contract—Illegality.*

An agreement that, if the tenant will continue to pay his rent in full without any deduction in respect of landlord's property tax paid by him, the landlord will repay to the tenant all sums which he has paid or shall pay for the landlord's property tax, is not invalid as being contrary to the provisions of 5 & 6 Vict. c. 35.

Judgment of the Queen's Bench Division, ante, p. 220, affirmed.

APPEAL of the defendants from an order of Mellor and Field, JJ., overruling a demurrer to a reply.

The pleadings are fully stated in the report of the proceedings before the Queen's Bench Division (1), and it is here necessary to give only the following abstract of them.

By the indorsement on the writ and by the notice in lieu of claim the plaintiff claimed certain sums amounting to 37*l.*, for property tax paid by him in respect of premises demised to him by the defendants' testator.

Defence: that the plaintiff never requested that the property tax should be allowed out of the next payment of rent, but that he always paid the rent without claiming any deduction.

Reply: that the plaintiff frequently demanded that the property tax should be allowed to him out of the next payment of rent; that the testator promised the plaintiff that if he would continue to pay the rent in full without deducting the property tax, the testator would repay to the plaintiff all sums that he should pay in that behalf; yet the testator did not repay the property tax paid by the plaintiff.

Meadows White, Q.C., and *A. P. Stone*, for the defendants. The contract set out in the reply is void and illegal. By 5 & 6 Vict. c. 35, s. 60, (2) the tenant is to deduct the tax from the next

(1) Ante, p. 220.

(2) By 5 & 6 Vict. c. 35, s. 60, sch. (A.), No. IV., Rule 9, "The occupier of any lands, tenements, hereditaments, or heritages, being tenant of the same, and paying the said duties, shall deduct so much thereof in respect of the rent payable to the landlord for the time

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payment of rent; by s. 73 no contract between landlord and tenant as to the payment of taxes and assessments is to be deemed to extend to the property tax; by s. 103 a penalty is imposed upon a landlord who refuses to allow a deduction of the tax, and all contracts for the payment of the tax by the tenant shall be void. The contract set out in the reply is in effect that a deduction shall never be made from the rent, but that a mere personal liability of the landlord shall be substituted. It is an agreement subversive of the policy of the statute, whereby it was desired to give adequate protection to the tenant, but only upon condition of his deducting the tax from the next payment of rent:

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being (all sums allowed by the commissioners being first deducted) as a rate of sevenpence for every twenty shillings thereof would by a just proportion amount unto, which deduction shall be made out of the first payment thereafter to be made on account of rent; and the receivers of her Majesty and all landlords, both mediate and immediate, their respective heirs, executors, administrators, and assigns, according to their respective interests, and their respective receivers or agents shall allow such deduction upon receipt of the residue of the rent, under the penalty herein contained; and the tenant paying the said assessment shall be acquitted and discharged of so much money as if the same had actually been paid unto the person to or for whom his rent shall have been due and payable; and the occupier of lands charged on the amount of any composition, rent, or payment for tithes arising therefrom, and paying the said duties, shall be entitled to make the like deduction from such composition, rent, or payment on paying the same."

By s. 63, sch. (B.), No. IX., Rule 1: "The said duties . . . shall be charged on and paid by the occupier for the time being, his executors, administrators, and assigns."

By s. 73: "No contract, covenant, or agreement between landlord and tenant, or any other persons, touching the payment of taxes and assessments to be charged on their respective premises, shall be deemed or construed to extend to the duties charged thereon under this Act, nor to be binding contrary to the intent and meaning of this Act; but that all such duties shall be charged upon and paid by the respective occupiers, subject to such deductions and repayments as are by this Act authorized and allowed; and all such deductions and repayments shall be made and allowed accordingly, notwithstanding such contracts, covenants, or agreements."

By s. 103: "If any person shall refuse to allow any deduction authorized to be made by this Act out of any rent or other annual payment mentioned in the ninth and tenth rules of No. IV., sch. (A.). . . . . Every such person shall forfeit the sum of fifty pounds; and all contracts, covenants, and agreements made or entered into, or to be made or entered into, for payment of any interest, rent, or other annual payment aforesaid in full, without allowing such deduction as aforesaid, shall be utterly void."

Denby v. *Moore*. (1) Under the contract relied on by the plaintiff the tenant loses the benefit of his security if the landlord turns insolvent, or if he assigns the reversion and then goes abroad.

C. Dodd, for the plaintiff, was not called upon to argue.

BRETT, L.J. I think that the judgment of the Queen's Bench Division must be affirmed. If it were not for the agreement set forth in the reply, the plaintiff would not be allowed to recover back the sums which represent the landlord's property-tax: for he has paid them without deducting their amount from the next payment of the rent. The reply, however, shews that the rent has not been simply paid in full; but that the sums representing the property tax have not been deducted owing to a promise by the landlord, that he would return them to the tenant at a subsequent time. The question is, whether that promise is rendered void or illegal by the Property Tax Act (5 & 6 Vict. c. 35). I think that our decision must be governed by s. 103 alone; for s. 73 has nothing to do with the question before us. We must look at the substantial object of the enactment; and the same rule must be used in interpreting a statute as in construing other documents. The substance of s. 103 is that although the tax is levied upon the tenant who is in occupation, yet the landlord is ultimately to bear the burden of it, and that any agreement to the contrary is void. In order to cast the burden upon the landlord it is unnecessary to hold that an agreement is illegal, if it provides that the tenant shall in the first instance pay the rent without deducting the tax, and that the landlord will subsequently repay him; for the object of the statute is thereby fulfilled. It is said that the deduction must be made at the time of the next payment of rent: that is an argument which may be pressed too far: suppose that the rent is paid in full to the landlord, and that he forthwith returns to the tenant the amount of the tax: can it be said that a transaction of that kind is not a deduction in respect of the tax, but a mere voluntary payment by the landlord? I think that nothing in s. 103 renders irrecoverable the sums claimed by the plaintiff.

(1) 1 B. & Ald. 123.

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COTTON, L.J. The question is whether the promise set out in the reply is void under the Property Tax Act: the promise is in substance that if the tenant will pay the rent in full, the landlord will subsequently repay the amount of the property tax. The object of the enactments cited before us is that the tax shall be borne by the landlord. That object is partly attained by s. 73. By other provisions in the statute the tax is to be collected from the occupier, who, if a tenant, is entitled to deduct the amount from the rent; but he has no remedy, unless he deducts the tax from the next payment of rent. This is the general rule: the question now is whether the tenant may recover back the amount of the tax, if he pays the rent in full relying upon a promise by the landlord to return the sums paid in respect of the tax. A promise of that kind is in truth an undertaking to allow the amount of the tax; and looking at the substance of the transaction, I think that the agreement does not violate the object of the legislature: if the landlord does return the amount of the tax to the tenant, it seems to me to be such an allowance of it as was contemplated by the legislature. In order to ascertain whether the agreement is void, we must look to the construction of the statute; and it seems to me that nothing in the Act of Parliament renders the agreement null and void; it is not a covenant or contract within s. 103; it cannot be brought within the general prohibition; it is not against the general intention of the legislature. The tenant has paid the rent in full without insisting upon his lien for the tax; the deduction is to be allowed for his benefit, and it would be strange so to construe the statute as to deprive him of that benefit.

THESIGER, L.J. I am of the same opinion. The legislature had two objects in view: one, that the property tax should be collected with facility; the other, that the landlord shall be ultimately liable for it. In order to further the first object, which I have mentioned, by 5 & 6 Vict. s. 63, sch. B, No. IX. rule 1, the tax is to be paid by the occupier, who may be a tenant for years; and to enforce the second object, by s. 73 no contract between landlord and tenant as to the payment of taxes and assessments shall be deemed to extend to the property tax. By s. 103 a

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penalty is imposed upon the landlord if he refuses to allow the deduction, and all contracts for the payment of the rent in full are declared to be void. The reply in effect alleges that at the time of the payment of the rent, the defendants' testator, who was the landlord, requested the plaintiff to pay the rent in full, and promised in consideration of his so doing to repay him the amount of the property-tax. I think it impossible to say that this was such a refusal as to render the testator liable to the penalty imposed by s. 103. This consideration gives insight into the construction of the statute: it was the intention of the legislature that no contract should be upheld whereby the tenant is to become liable to the burden of the tax; but any arrangement between the parties to a demise, whereby the tenant is ultimately relieved from the payment of the tax, is good.

Judgment affirmed.

Solicitor for plaintiff: *Marsh, for Bescoby, East Retford.*

Solicitors for defendants: *Collyer-Bristow & Co., for Hett, Freer, & Co., Brigg.*

[IN THE COURT OF APPEAL.]

June 25.

HARRIS *v.* PETHERICK.

Practice—Costs—Power of Judge to order successful Plaintiff to pay Defendant's Costs—Costs of Former Trial—Rules of the Supreme Court, Order LV.

A judge has power to order a plaintiff who recovers a nominal sum to pay the defendant's costs, even when the action is tried before a jury.

In an action to recover a sum of 85*l.* and also a sum of 6*s.* the plaintiff was nonsuited; a new trial having been ordered, at the second trial which took place before a jury, he failed as to his claim for 85*l.*, but proved his claim for 6*s.* The judge ordered that the plaintiff should pay the costs of both trials:—

Held, that the order was right, and could not be set aside.

5 Ex D 15
5 C P D 29
31
5 Ex D 308
310
8 Q B D 26

APPEAL of the plaintiff from an order of Cockburn, C.J, and Mellor, J., for payment of costs of trial and of rule nisi.

The action was brought to recover a sum of 85*l.* as commission for obtaining a partnership, and also a sum of 6*s.*, being the cost of an advertisement relating to the sale of a horse. It was tried twice; at the first trial the plaintiff was nonsuited; a second trial

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was ordered, which took place before a jury; the plaintiff failed as to his claim for commission, but proved his claim as to the cost of the advertisement. When the second trial was ordered, no direction was given as to the costs of the first trial. Manisty, J., ordered that although the plaintiff had upon the second trial recovered the sum of 6*s*., he should pay the costs of both trials. The Queen's Bench Division refused to overrule the order of Manisty, J.

A. B. Kempe, for the plaintiff, contended that even if a judge at a trial without a jury had an absolute discretion as to costs, he could not under Rules of the Supreme Court, Order LV. (1), direct that the successful party should pay the costs where the trial took place before a jury; and further, that as the order for a new trial had not given any direction as to the costs of the former trial, and of the order for it, Manisty, J., had not power to order the plaintiff to pay them; as to this latter point he relied upon *Creen* v. *Wright*. (2)

Lord, for the defendant, was not called upon to argue.

BRAMWELL, L.J. I feel some pleasure in holding that the order of Manisty, J., is right. The question is whether a plaintiff, who has recovered only a small sum, can be ordered by the Court to pay the defendant's costs. If it were possible to apportion the costs of the issues between the parties, perhaps it would in some cases, especially in actions for slander where the damages are assessed at a farthing, be the most satisfactory manner of concluding a litigation in which, at least technically, both the plaintiff and the defendant are to blame. Upon the words of the first portion of Order LV., I am strongly of opinion that it is within the power of the Court, although the plaintiff has succeeded to some extent, to compel him to pay the defendant's costs as well as his own: it appears to me clear that, where the action has been

(1) By Rules of the Supreme Court, Order LV.: "Subject to the provisions of the Act, the costs of and incidental to all proceedings in the High Court shall be in the discretion of the Court . . . provided that where an action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial, for good cause shewn, the judge before whom such action or issue is tried, or the Court, shall otherwise order."

(2) 2 C. P. D. 354.

tried without a jury, the circumstance that the plaintiff has recovered something will not of itself relieve him from liability to pay the defendant's costs. The proviso at the end of the order does not take away that power: the only difference is that if the action is tried before a jury, it is requisite that "good cause" be shewn; but when that has been done, the judge or Court has the same absolute discretion, as if the action had been tried without a jury. Therefore I hold that a judge has power to direct that a plaintiff shall pay the costs of the action, although he obtains judgment for a small amount. In the present case it is said that at the first trial the miscarriage of a nonsuit took place, because the defendant wrongly contended that upon the facts proved the plaintiff was not entitled to recover any amount: but the result of the second trial shews that the defendant has been wrongfully harassed with a vexatious action, and that his resistance to the plaintiff has been made bonâ fide. I really think that it is not open to us to consider the question, for as "good cause" has been shewn, the condition imposed in the proviso has been complied with, and the judge had an absolute discretion to order that the whole costs of the litigation should be paid by the plaintiff. The order was right, and was not open to review either by us or the Queen's Bench Division.

BRETT, L.J. The first portion of Order LV. is unlimited in its terms, and confers upon the judge an unlimited discretion. By the second portion which relates to trials before a jury, it is directed that the costs shall follow the event, unless for good cause shewn the judge shall otherwise order. If that condition is complied with, the judge has ample discretion. Has there been "good cause" shewn in the present instance? The action was brought for two sums, 85*l.* and 6*s.*: the plaintiff has failed as to the former, although he has succeeded as to the latter: he has therefore failed as to the substantial cause of action. Upon this state of facts there was amply sufficient ground for Manisty, J., to exercise his discretion in favour of the defendant, and I think the order was proper to be made. I agree with Bramwell, L.J., that Manisty, J., had also a discretion to deal with the costs of the first trial.

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COTTON, L.J. If "good cause" be shewn, the discretion of the judge under the proviso at the end of Order LV. is as large as that under the first clause, and I also think that Manisty, J., had power to deal with the costs of the first trial. I have had some doubt whether the plaintiff, who has obtained judgment for a small amount, can be ordered to pay the defendant's costs; but as the other Lords Justices are of opinion that he can be made to do so, I do not dissent from that view. Under the old practice in Chancery I do not think that a successful plaintiff was ever ordered to pay costs. However, in the present case if the costs of the issues had been apportioned, the plaintiff would probably have had to pay a large portion of the costs of the action: for he has failed as to his claim for 85*l.*, and succeeded only as to the claim for 6*s.*, and the substantial costs were probably caused by the claim for the larger amount.

Appeal dismissed.

Solicitor for plaintiff: *John Croft.*

Solicitors for defendant: *Walker, Twyford, Belward, & Whitfield.*

June 21.

[CROWN CASE RESERVED.]

THE QUEEN *v.* HUGHES.

Perjury—Petty Sessions—Jurisdiction of Justices—Information—Warrant, Illegal Issue of.

14 QBD 28

H., a police constable, procured a warrant to be illegally issued, without a written information or oath, for the arrest of S., upon a charge of "assaulting and obstructing him, H., in the discharge of his duty." Upon such warrant S. was arrested and brought before justices, and was, without objection, tried by them and convicted.

H., was afterwards indicted for perjury committed on the said trial of S., and convicted:—

Held, by Lord Coleridge, C.J., Denman, J., Pollock and Huddleston, BB., Field, Lindley, Manisty, Hawkins, and Lopes, JJ. (Kelly, L.C.B., dissenting), that H. was rightly convicted, notwithstanding that there was neither written information, nor oath, to justify the issue of the warrant, and that the justices had jurisdiction to hear the charge, though the warrant upon which the accused was brought before them was illegal.

CASE reserved by Bramwell, L.J.

"Owen Hughes was convicted before me at the last Anglesea

Assizes, of perjury. He swore falsely and corruptly on the hearing of a charge against John Stanley at petty sessions, for an assault on him, Owen Hughes, and for obstructing him, being a police constable, in the discharge of his duty. But it was objected that the defendant Owen Hughes should be acquitted, on the ground that the proceedings were informal and without jurisdiction in the magistrates who heard the case. Hughes went to the office of the clerk to the justices, saw there a clerk of the clerk, and told him he wanted a warrant against John Stanley, for assaulting him and obstructing him in the discharge of his duty. The clerk gave him a form of a warrant to that effect, which Hughes took to a magistrate, who signed it. There was no written information nor oath by Hughes, or any other person, to found or justify the issuing of the warrant. Stanley, however, was arrested on the warrant by Hughes and brought before the magistrates. The case was gone into of assault and obstruction. No objection was taken by Stanley, who defended himself, and called a witness to shew he was not guilty. I overruled the objection, and, as I have said, the defendant Hughes was convicted.

"I have now to ask the Court for the consideration of Crown cases reserved, whether, because there was no written information, nor oath, I ought to have directed an acquittal?—If I ought, the conviction should be quashed, otherwise not."

Bramwell, L.J., further, in answer to questions put by this Court, reported as follows:—"There was no evidence before me that the warrant on which the man Stanley was arrested was produced before the justices who convicted him. No one thought it necessary to inquire into such a matter. The case before me was conducted on the footing that the case before the magistrates was conducted in the same way as it would have been if the warrant had been issued on a written information duly sworn to."

[The case was twice argued, the first time before five judges who, differing in opinion, ordered the case to be re-argued.]

C. S. C. Bowen (*Muir Mackenzie*, with him, for the prisoner). The prisoner was not guilty of perjury, because the proceedings in which he was sworn were coram non judice. In order to decide this, it is necessary to consider the requisites for giving to justices

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jurisdiction. There is, however, some difficulty in ascertaining under what statute the conviction of Stanley was supposed to be. Probably it was under 34 & 35 Vict. c. 112, s. 12, which is, "Where any person is convicted of an assault on any constable when in the execution of his duty, such person shall be guilty of an offence against this Act, and shall, in the discretion of the Court, be liable either to pay a penalty not exceeding twenty pounds, and, in default of payment, to be imprisoned, with or without hard labour, for a term not exceeding six months, or to be imprisoned for any term not exceeding six, or in case such person has been convicted of a similar assault within two years, nine months, with or without hard labour." It is not stated in the case what the sentence was, but it is suggested that it was one of six months' imprisonment with hard labour. If the conviction was not under the above section it must have been supposed by the justices that they were convicting under 24 & 25 Vict. c. 100, s. 38. "Whosoever shall assault any person with intent to commit felony, or shall assault, resist, or wilfully obstruct any peace officer in the due execution of his duty, or any person acting in aid of such officer . . . . shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour." If so, they were convicting summarily under a statute which did not empower them to convict summarily.

[KELLY, C.B. What was the charge made against the prisoner at the time, and how and in what shape was it made?]

That cannot be clearly ascertained from the case. It is contended there was no legal charge.

The point raised by the case, which states that there was no information or oath in writing, is, whether, in the absence of any written information or oath, the justices had jurisdiction. Assuming that the conviction was under 34 & 35 Vict. c. 112, s. 12, the procedure is regulated by that statute, s. 17 of which enacts that any offence against that Act may be prosecuted before a court of summary jurisdiction in England in manner directed by 11 & 12 Vict. c. 43, and any Act amending the same. It is a statutory jurisdiction given to justices to convict summarily. Such jurisdiction created by statute is confined by statute, and

but for the statute, and in conformity with its provisions, the justices have no jurisdiction. The above statute incorporates the procedure given in 11 & 12 Vict. c. 43: Jervis's Act. The object of this latter statute, as appears from the preamble thereto, was to consolidate the statutes with regard to the duties of justices in respect of summary convictions and orders, and to define such duties clearly by positive enactment, as well as to amend the procedure. The information always was, and is still, the foundation of the jurisdiction of justices in summary convictions, and the basis of all the subsequent proceedings. In Paley on Convictions, p. 64 (5th ed.), by Macnamara, this doctrine is clearly laid down. It is there said: "It is requisite in all summary proceedings of a penal nature that there should be an information or complaint, which is the basis of all the subsequent proceedings, and without which, the justice is not authorized in intermeddling, except when he is empowered by statute to convict on view," and, further, "a sufficient information by competent persons relating to a matter within the magistrates' cognizance gives him jurisdiction, irrespective of the truth of the facts contained in it . . . . as, on the one hand, the information is not invalidated by reason of the statements being false, so, on the other, it cannot be rendered valid by the testimony offered in support of it, for the office of the evidence is to prove, not to supply, a legal charge." Justices are not to wade through the evidence offered, and therefrom to collect a charge, but a specific charge is first to be made, and the evidence taken, directed to prove that charge. It is of importance that justices should be compelled to act in strict conformity with the procedure laid down for them in Jervis's Acts, for any looseness of practice in the granting of warrants, or in the dispensing with proper charges or informations, might result in serious mischief. Under 11 & 12 Vict. c. 43, Jervis's Act, the information required is a written one. Sect. 1 of that Act enacts, that in all cases where an information shall be laid, or complaint made, the justices may issue a summons requiring the person summoned to answer the information or complaint. Sect. 2 enables justices, if they think fit, upon oath or affirmation substantiating the matter of such information or complaint, to issue their warrant to arrest the party charged, or complained against, if he does not appear to the

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summons. Sects. 4, 7, 8, 9, shew that it was intended that the information should be written. Sect. 10 enacts that every information for any offence punishable upon summary conviction, unless some particular Act shall otherwise require, may be made or laid without any oath or affirmation being made of the truth thereof, except where the justices shall issue their warrant in the first instance, and in every such case the matter of such information shall be substantiated upon oath before any such warrant shall be issued. Here the warrant was issued without any such information. The information, the basis of all subsequent proceedings, was absent. The language of s. 10 is imperative. The justices have to deal with the hearing of the information, that is all they have jurisdiction to do. The submission or consent of Stanley could not give jurisdiction. Consent gives no jurisdiction in criminal matters; and with regard to procedure, there can be no waiver in a criminal case.

[KELLY, C.B. If there is no charge, how can what is sworn to be material to a charge?]

It cannot. What a witness says on the trial is not the charge. In order to constitute perjury, there must be wilful and corrupt false swearing, or affirmation, upon a legally made charge. In *Reg.* v. *Carr* (1) it was held that it should be proved distinctly on the trial of an indictment for perjury what the charge was, on the hearing of which the false evidence was given. In *Reg.* v. *Scotton* (2) it was held that an information not on oath was not sufficient to give justices jurisdiction to entertain a charge of an offence under 6 & 7 Wm. 4, c. 65. There is no substantial difference in the wording of that enactment and Jervis's Act, 11 & 12 Vict. c. 43, upon this point. In *Caudle* v. *Seymour* (3) a warrant issued by justices was held bad which did not shew any information on oath upon which it had been issued. Patteson, J., there says: "The everyday practice is to state an information on oath; if the magistrate omits that he must take the consequences." Coleridge, J., in the same case says: "It is true that a magistrate here has jurisdiction over the offence in the abstract, but to give him jurisdiction in any particular case it must be shewn that

(1) 10 Cox, C. C. 564.

(2) 5 Q. B. 493; 13 L. J. (M.C.) 58; 8 Jur. 400; 1 New Sess. Cas. 27.

(3) 1 Q. B. 889; 10 L. J. (M.C.) 130; 1 G. & D. 454; 5 Jur. 1196.

there was a proper charge upon oath, in that case. A man has no right, because he is a magistrate, to order another to be taken for an offence over which he has jurisdiction, without a charge regularly made."

It is admitted that the justices had jurisdiction in the abstract to try Stanley for the assault, but it is contended that in order to put him on his trial an information on oath was requisite. [He referred also to *Reg.* v. *Pearce.* (1)]

[DENMAN, J., called attention to *Reg.* v. *Millard.* (2)]

In that case the charge was under a special statute, which rendered a sworn information unnecessary. The case of *Turner* v. *Postmaster-General* (3), which will be relied on for the prosecution, did not turn upon Jervis's Act, but upon a special statute. It is a decision that the want of an information and summons may, under the statute there in question, be cured by appearance before justices without objection. That is, that under that particular statute, the information did not go to the root of the jurisdiction of the justices. The information is not mere process to bring the accused before the Court, it is procedure which cannot be waived, it is the foundation of jurisdiction, it is the charge which has to be inquired into, and in support of which evidence is adduced, to use the expression given in s. 9 of Jervis's Act.

In the cases where there has been said to have been a waiver of some irregularity in the mode of summoning the accused, it is perhaps hardly correct to use the expression "waiver." In such cases, which will be found to be civil cases, or quasi-civil cases, such as bastardy proceedings, the getting the accused before the tribunal is not the foundation of jurisdiction. A man cannot waive that which, for the protection of the public, the law requires. The justices to proceed lawfully, must have jurisdiction, when they enter upon the inquiry, to make the inquiry. Denman, C.J., in *Reg.* v. *Bolton* (4) says, "The question of jurisdiction is determinable, at the commencement, not at the conclusion, of the inquiry." See also notes to *Crepps* v. *Durden.* (5)

(1) 3 B. & S. 531; 32 L. J. (M.C.) 75.

(2) 22 L. J. (M.C.) 108; Dears. & P. C. C. 166; 17 Jur. 400.

(3) 5 B. & S. 756; 34 L. J. (M.C.) 10; 10 Cox, C. C. 15.

(4) 1 Q. B. 66; 10 L. J. (M.C.) 49.

(5) 1 Sm. L. C. 7th ed. p. 735.

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[HAWKINS, J. Had the justices jurisdiction to try for a common assault?]

What the charge was before the justices is uncertain, a man cannot be tried for, or charged with, one offence, and convicted of another. The justices could not listen to a charge of a common assault, and on that take evidence, and then convict of assault on a constable in the execution of his duty. *Martin* v. *Pridgeon* (1); *Reg.* v. *Brickhall* (2); *Blake* v. *Beech.* (3)

Poland (*Sir John Holker*, *A.G.*, and *Dicey*, with him), for the Crown. The justices had jurisdiction to try Stanley. Their jurisdiction did not depend upon the regularity of the warrant by means of which he was brought before them. It must be admitted that the warrant was improperly issued, but Stanley was brought before the justices, and had to be dealt with. Stanley raised no objection to being then and there dealt with, and it would be a curious result if the prisoner Hughes could now take the objection. The question is not whether Stanley was properly convicted, but whether there was a trial, a legal proceeding, on which Hughes swore falsely and corruptly. The warrant is not the charge, it is a means of procuring the attendance of the accused. The charge was made orally, and it is on the charge so made that Hughes swore falsely and corruptly. The present case is covered substantially by authority. In *Reg.* v. *Millard* (4) upon an indictment for perjury, Wightman, J., ruled "that the magistrates had jurisdiction to hear a charge under the Malicious Trespass Act, although the information was not on oath, and that the omission to lay the information on oath was an error in procedure only." This ruling of Wightman, J., was upheld by the Court for the consideration of Crown Cases Reserved, that Court holding that the oath was matter of procedure, and that the absence of it did not oust the jurisdiction of the justices. In the case of *Turner* v. *Postmaster-General* (5), in argument, the passage from Paley on Convictions, relied upon in the present

(1) 1 E. & E. 778; 28 L. J. (M.C.) 179.

(2) 33 L. J. (M.C.) 156; 10 Jur. (N.S.) 677.

(3) 1 Ex. D. 320; 45 L. J. (M.C.) 111.

(4) 22 L. J. (M.C.) 108; D. & P. C. C. 166; 17 Jur. 400.

(5) 5 B. & S. 756; 10 Cox, C. C. 15; 34 L. J. (M.C.) 10.

case, was read, and the Court there held, that the want of an information and summons was cured by the appearance of the accused. If a person is before the justices, and is informed of the charge against him, and he desires then and there to meet it, and requires no adjournment, it cannot be that the justices are bound to refuse to hear the charge, and to await his being summoned, or brought before them, by formal process. The mode by which an accused person is brought before the Court, is immaterial, when he is there taking no objection. Anything in the nature of process, or procedure, may be waived: *Blake* v. *Beech* (1); *Reg.* v. *Berry* (2); *Reg.* v. *Fletcher* (3); *Reg.* v. *Smith* (4); *Reg* v. *Hurrell.* (5)

C. S. C. Bowen, replied. In *Rex* v. *Fearshire* (6), Lord Mansfield says: "It is the duty of the magistrate to take all charges of whatsoever nature, kind, or complexion they may be, in writing," and further he speaks of it as an "indispensable duty." It is by enforcing regularity in these matters that justice is secured. The position taken on behalf of the accused is not shaken by the cases cited, for the reasons given; and as to the bastardy cases, in the first cited, *Reg* v. *Berry* (2), Lord Campbell says: "The proceeding to obtain an order of affiliation and maintenance is not a proceeding in pœnam to punish for a crime, but merely to impose a pecuniary obligation, and is a civil suit within the meaning of 14 & 15 Vict. c. 99, ss. 2, 3," and he cites for that proposition *Reg.* v. *Lightfoot.* (7) And further, he goes on to say that, in such a case, the summons is "mere process to bring the defendant into court in a civil suit." In *Reg.* v. *Fletcher* (3) the case of *Reg.* v. *Berry* (2) is followed, and its reasoning approved. The judgment of Field, J., in *Blake* v. *Beech* (1) is not against this contention, he decided that Jervis's Act did not apply in that case. The judgments of the two judges who held that Jervis's Act did there apply, are in the prisoner's favour. The principle of their decision is, that a statutory jurisdiction is to be exercised as the

(1) 1 Ex. D. 320; 45 L. J. (M.C.) 111.

(2) 28 L. J. (M.C.) 86; 8 Cox, C. C. 121; 5 Jur. (N.S.) 228.

(3) 40 L. J. (M.C.) 128; Law Rep. 1 C. C. R. 320.

(4) Law Rep. 1 C. C. R. 110; 37 L. J. (M.C.) 6.

(5) 3 F. & F. 271.

(6) 1 Lea. C. C. 202.

(7) 6 E. & B. 822; 25 L. J. (M.C.) 115.

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statute points out. To use the words of Cleasby, B., in that case, and to apply them to the present, "It is not a matter within the discretion of the magistrates whether a man shall be put on his trial without any proper preliminary proceedings." Magistrates should be held strictly to Jervis's Acts: those Acts should not be reduced to the position of a "Justices' Manual," or "Useful Hints for Magisterial Proceedings."

LOPES, J. The facts of this case, and the Acts of Parliament and authorities which bear upon it, have been fully gone into by the judgments of the other members of the Court, which I have read. I agree in substance with the judgments which will be delivered, but do not desire to commit myself to any opinions which have been expressed collateral to the question before us. I think the warrant in this case was mere process for the purpose of bringing the party complained of before the justices, and had nothing whatever to do with the jurisdiction of the justices. I am of opinion that whether Stanley was summoned, brought by warrant, came voluntarily, was brought by force, or under an illegal warrant, is immaterial: being before the justices, however brought there, the justices, if they had jurisdiction, in respect of time and place over the offence, were competent to entertain the charge, and being so competent, a false oath, wilfully taken, in respect of something material, would be perjury.

HAWKINS, J. I am of opinion that the conviction was right, and ought to be affirmed. In arriving at this opinion, I have assumed as a fact, from the case as stated, that Stanley was arrested and brought before the justices upon as illegal a warrant as ever was issued. A warrant signed by a magistrate, not only without any written information or oath to justify it, but without any information at all. It follows that the magistrate who issued the warrant, and the defendant who with knowledge of the illegality executed it, were liable to an action for false imprisonment. If authority were wanting for this, I need but refer to *Caudle* v. *Seymour* (1); *Morgan* v. *Hughes* (2), per Ashurst, J.; *Stevens* v.

(1) 1 Q. B. 889; 1 G. & D. 454; 5 Jur. 1196.
(2) 2 T. R. 225, 231.

Clark. (1) Wrongful however as were the proceedings by which Stanley was brought into the presence of the magistrates, to answer a charge which up to that moment had never been legally preferred against him, before those magistrates, and in his presence, a charge was made, over which, if duly made, they had jurisdiction. Upon that charge it was that the hearing proceeded; and in support of that charge it was that the defendant was sworn; and in giving his evidence swore corruptly and falsely. The case expressly finds, that the alleged perjury was committed "on the hearing of a charge against John Stanley at petty sessions for an assault on him, Owen Hughes, and for obstructing him, being a police constable, in the discharge of his duty." Comparing this finding with the language of 24 & 25 Vict. c. 100, s. 38, which enacts that "whosoever shall assault, resist, or wilfully obstruct any peace officer in the due execution of his duty, shall be guilty of a misdemeanour," I come, without hesitation, to the conclusion that the charge was that of the indictable offence created by that statute; and I do not think a doubt could have been suggested as to this, had we not been informed in the course of the argument that the justices, in the result, dealt summarily with the case, and convicted Stanley under s. 12 of 34 & 35 Vict. c. 112, of an assault upon Hughes, being a constable in the "execution" of his duty, and sentenced him to six months' imprisonment with hard labour. The case does not find in what form the charge was made, whether in writing or otherwise. In my opinion writing was unnecessary; but even were it so, I would, in the absence of evidence to the contrary, assume it to have been properly made, as did Crompton, J., in *Turner* v. *Postmaster-General.* (2) Now a charge having been made before them, of an indictable offence, committed within their jurisdiction, by a person then bodily present, it seems to me the justices were bound to take cognizance of it. The 17th section of 11 & 12 Vict. c. 42, expressly recognises the legality of depositions of witnesses taken in cases in which persons charged with indictable offences are "brought" before justices "with or without warrant." Had the justices proceeded upon the defendant's deposition to commit Stanley for trial, instead of convicting him

(1) 1 C. & M. 509; 2 Mood. & Rob. 435.

(2) 5 B. & S. 756; 34 L. J. (M.C.) 10; 10 Cox, C. C. 15.

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summarily; it is difficult to see what possible objection could have been made to the legality of their proceedings. They did not, however, think fit to adopt that course. They took, it is true, the evidence on oath of the defendant upon the charge for the indictable misdemeanour created by 24 & 25 Vict. c. 100; but having done so, they proceeded to convict summarily under a different statute, 34 & 35 Vict. c. 112, without, as I collect, any new information or charge of the latter offence. In short, they convicted him of an offence with which he had never been legally charged. In this, I am of opinion, they were wrong; and upon this ground I am strongly inclined to think the conviction may be quashed. *Martin* v. *Pridgeon* (1), and *Reg.* v. *Brickhall* (2), more particularly referred to hereafter, are strong authorities in favour of this view. It does not, however, seem to me to be necessary to decide that point; for in the case before us we have only to determine whether the justices, at the moment when they swore the defendant in support of the charge which was made, had jurisdiction to hear that charge. Whether they afterwards pronounced a legal or an illegal judgment is immaterial to the present inquiry. Assuming, however, contrary to the view I have taken, that the charge upon which the defendant was sworn was of an offence punishable upon summary conviction under 34 & 35 Vict. c. 112, and that verbal information of that offence was made before the magistrate, who, without written information or oath, illegally issued the warrant under which Stanley was brought before the petty sessions, I should still be of opinion that the justices in hearing that charge, and taking evidence in support of it, were acting within their jurisdiction. There is a marked distinction between the jurisdiction to take cognizance of an offence, and the jurisdiction to issue a particular process to compel the accused to answer it. The former may exist; the latter may be wanting. To found jurisdiction to take cognizance of an offence, notwithstanding the dictum of Lord Mansfield in *Rex* v. *Fearshire* (3), it has been constantly held that a written information is not necessary: per Grose, J., in *Rex* v. *Thompson* (4); per

(1) 1 E. & E. 778; 28 L. J. (M.C.) 179.
(2) 33 L. J. (M.C.) 156; 10 Jur. (N.S.) 677.
(3) 1 Leach, C. C. 202.
(4) 2 T. R. 18, 23.

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Park, B., in *Reg.* v. *Millard* (1); per Erle, C.J., in *Reg.* v. *Shaw* (2); and per Crompton, J., in *Turner* v. *Postmaster-General* (3); see also old forms of conviction, in which the information is set out thus: "A. B. . . . giveth me to understand and be informed, &c." The information, which is in the nature of an indictment, of necessity precedes the process; and it is only after the information is laid, that the question as to the particular form and nature of the process can properly arise. Process is not essential to the jurisdiction of the justices to hear and adjudicate. It is but the proceeding adopted to compel the appearance of the accused to answer the information already duly laid, without which no hearing in the nature of a trial could take place (unless under special statutory enactment). If a mere summons is required, no writing or oath is necessary. A bare verbal information is sufficient. If a warrant is required, then, and for that purpose only, an oath substantiating the information is requisite, not only by the provisions in Jervis's Acts, so often referred to, but by the common law, of which it was always a doctrine that a warrant which deprives a man of liberty ought not to issue without oath of the truth of the information: see *Rex* v. *Heber*. (4) To justify a warrant, I am also of opinion that a written information is necessary. In the case of indictable offences it is expressly made so by s. 8 of 11 & 12 Vict. c. 42. The illegality of the warrant and of the arrest did not however affect the jurisdiction of the justices to hear the charge, whether that hearing proceeded upon a valid verbal information, followed by an illegal process, or upon an information for the first time laid in the presence of Stanley, upon which he was then and there instantly charged. The dictum of Holt, C.J. (5), is an express authority recognising the legality of a conviction upon an information instanter. Stanley might, it is true, had he known of the illegality of his arrest, have demanded his release from it, and prayed for an adjournment to a future day, to enable him to prepare his defence. This I think it would have been the duty of the magistrates to grant: see per Crompton, J.,

(1) 22 L. J. (M.C.) 108; Dears. & P. C. C. 166; 17 Jur. 400.

(2) 34 L. J. (M.C.) 169, 173; 10 Cox, C. C. 66.

(3) 5 B. & S. 756; 10 Cox, C. C. 15; 34 L. J. (M.C.) 10.

(4) 2 Barn. 101.

(5) *Rex* v. *Fuller*, 1 Ld. Raym. 509.

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in *Turner* v. *Postmaster-General* (1); and per Blackburn, J., in *Reg.* v. *Shaw.* (2)

A refusal to do this, however, would not have destroyed their jurisdiction, though it might possibly have afforded good ground for setting aside the conviction, on the ground that they had not allowed the accused sufficient opportunity to answer the charge. Another course might have been pursued, viz., to commence to hear, and if necessary adjourn, the further hearing to a future day. A power expressly given by 11 & 12 Vict. c. 43, s. 16. It so happens, however, in the case before us, that neither the magistrates, nor Stanley, were aware of the illegality of the warrant, and so the hearing proceeded, without objection, and as if all things were in order. To use the language of the case: "The case was gone into of assault and obstruction." Stanley "defended himself, and called a witness to shew he was not guilty," and in the result was convicted, as I have above mentioned. Possibly that conviction may be open to the objections that the justices had no jurisdiction to convict of the offence created by statute 34 & 35 Vict. c. 112, when the only charge made against him was of the misdemeanour created by 24 & 25 Vict. c. 100, on the authority of *Reg.* v. *Brickhall* (3), or upon the ground that, under the circumstances, Stanley had not such opportunity of answering, and time to answer, as he was in common justice entitled to: see *Blake* v. *Beech.* (4) If the contention on the part of the defendant be correct, then Stanley, even though he had suffered the whole imprisonment to which he was sentenced, would be liable to be tried again, and could not plead autrefois convict; and if he had been acquitted would have been in no condition to plead autrefois acquit. Two very startling consequences. A flood of authorities might be cited in support of the proposition that no process at all is necessary, when, the accused being bodily before the justices, the charge is made in his

(1) 5 B. & S. 756; 10 Cox, C. C. 15; 34 L. J. (M.C.) 10.

(2) 34 L. J. (M.C.) 169, 173; 10 Cox, C. C. 66.

(3) 33 L. J. (M.C.) 156; 10 Jur. (N.S.) 677.

(4) 1 Ex. D. 320. The case of *Reg.* v. *Gillyard*, 12 Q. B. 527; 17 L. J. (M.C.) 153; is a strong authority to show that the Queen's Bench have jurisdiction to quash on conviction upon other grounds than want of jurisdiction in the magistrates, e.g., on the ground of fraud, conspiracy, and perjury, in obtaining it.

presence, and he appears and answers to it. In 2 Hawk. 28, it is said: "It seemeth plain, from the nature of the thing, that there can be no need of process where the defendant is present in Court, but only where he is absent. In *Rex* v. *Stone* (1) Lord Kenyon said: "Justice requires that a party should be duly summoned and fully heard before he is condemned; but if he be stated to be present at the time of the proceedings, and to have heard all the witnesses, and not to have asked for any further time to bring forward his defence, if he had any, this at all times has been deemed sufficient." *Reg.* v. *Shaw* (2) is to the same effect, and appears to me to be decisive of the present case. The defendant in that case was convicted of perjury committed upon the hearing of a charge punishable on summary conviction, against one Kilshaw, a beer-shop keeper, under 18 & 19 Vict. c. 118. The proceedings, not being prescribed by that Act, were regulated, as are proceedings for the offence of which Stanley was convicted, by Jervis's Act, 11 & 12 Vict. c. 43. At the trial no proof was given of any written information warranting a summons, indeed the evidence shewed that the summons was filled up by the magistrate's clerk, handed to a superintendent of police, who took it to a magistrate, who read and signed it, without making any inquiry, or requiring any statement of fact. Very like the circumstances of the present case. It was proved, however, that Kilshaw appeared before the justices, that the charge was then made against him, that he answered it, and that the defendant committed perjury in evidence which he gave on his behalf. It was objected that the justices had no jurisdiction to hear the charge against Kilshaw, because there was no information to justify the issuing of a summons. Erle, C.J., said: "In my opinion, if a party is before a magistrate and he is then charged with the commission of an offence within the jurisdiction of that magistrate, the latter has jurisdiction to proceed with that charge without any information or summons having been previously issued, unless the statute creating the offence imposes the necessity of taking some such step." See also per Blackburn, J.: "I think when a man appears before justices, and a charge is then made against him, if he has not been summoned, he has a good ground for asking for an adjournment; if he

(1) 1 East, 649. (2) 34 L. J. (M.C.) 169, 173; 10 Cox, C. C. 66.

11 Jur. N. S. 415. 416

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waives that, and answers the charge, a conviction would be perfectly good against him, and the witnesses if they swore falsely would be liable to indictment for perjury." To the same effect are *Reg.* v. *Millard* (1); *Reg.* v. *Berry* (2); *Reg.* v. *Simmons* (3); *Reg.* v. *Smith* (4); *Reg.* v. *Fletcher* (5); *Turner* v. *Postmaster-General* (6); in which latter case the defendants were in custody upon a charge of felony which could not be sustained; but, before the magistrates, were charged with, and convicted of, a different offence, for which they could not be legally arrested without warrant on information on oath; yet the Court upheld the conviction. I do not look upon *Blake* v. *Beech* (7) as deciding that the magistrates in the case then before them had no jurisdiction, but only that the conviction ought to be quashed for irregularity under the peculiar circumstances of that case. *Reg.* v. *Pearce* (8) only decides that perjury cannot be committed by a witness who is sworn in a non-existing cause, which is undeniable. That case would have been a strong authority for the defendant if no charge had been made against Stanley before the defendant was sworn. *Reg.* v. *Scotton* (9) was the strongest authority cited in favour of the defendant. That case, however, turned upon the peculiar language of the 6 & 7 Wm. 4, c. 65, s. 9, "provided that before any proceedings shall be had or taken upon such information," the charge shall be deposed to on oath, &c. It does not become necessary, therefore, to consider how far that case has been affected by more recent decisions. In the course of the argument there was some discussion as to whether the warrant was produced before the justices. In my opinion whether it was, or not, is immaterial; had it been so, it would have proved nothing, for it could not in any sense be treated as the information. It was the act and process of the magistrate alone; not the information of the informer; and the

(1) 22 L. J. (M.C.) 108; Dears. & P. C. C. 166; 17 Jur. 400.

(2) 28 L. J. (M.C.) 86; 8 Cox C. C. 121; 5 Jur. (N.S.) 228.

(3) Bell, C. C. 168; 8 Cox, C. C. 190; 28 L. J. (M.C.) 183.

(4) Law Rep. 1 C. C. R. 110; 37 L. J. (M.C.) 6.

(5) 40 L. J. (M.C.) 128; Law Rep. 1 C. C. R. 320.

(6) 5 B. & S. 756; 10 Cox, C. C. 15; 34 L. J. (M.C.) 10.

(7) 1 Ex. D. 320; 45 L. J. (M.C.) 111.

(8) 3 B. & S. 531; 32 L. J. (M.C.) 75.

(9) 5 Q. B. 493; 13 L. J. (M.C.) 58; 8 Jur. 400; 1 New Sess. Cas. 27.

recital of an information in it would be no evidence that there was such an information in fact: see *Stevens* v. *Clark*, per Creswell, J. (1) I have carefully considered the provisions of Jervis's Acts, 11 & 12 Vict. cc. 42 and 43, but I find in them nothing at all militating against the view I have expressed. The sections of those statutes to which our attention was called which regulate the formalities to be observed when a charge is made against an absent person, whose presence it is desired to procure, do not seem to me to have any bearing upon a case like the present, where the charge is made in the presence of the accused, who is, then and there, called upon to answer it, as he lawfully may be, according to the dictum of Holt, C.J., to which I have referred. In such a case it is in my opinion altogether immaterial, so far as the jurisdiction of the justices to hear that charge is concerned, whether the accused was before them voluntarily or otherwise; or on legal or illegal process. I have already pointed out that Stanley may have good grounds for asking that his conviction may be quashed, irrespective of the invalid objection raised by the defendant. But this conviction in my opinion ought to be affirmed.

POLLOCK, B., and LINDLEY, J., concurred in the judgment of Hawkins, J.

MANISTY, J. I am of opinion that this conviction should be affirmed. The case finds that Hughes swore falsely and corruptly on the hearing of a charge against Stanley at petty sessions for an assault on him (Hughes) and for obstructing him, being a police constable, in the execution of his duty—and the question is, whether the justices had jurisdiction to hear that charge, Hughes having been brought before them by means of a warrant signed by a magistrate, but which warrant had been issued without any information in writing, or on oath. By virtue of the provisions in several statutes, which it is unnecessary for me to repeat, justices of the peace assembled in petty sessions have jurisdiction to hear a charge of an assault upon a constable in the execution of his duty, but it is only by the Prevention of Crimes Act, 1871 (34 &

(1) 1 Car. & M. 509.

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35 Vict. c. 112) that they can summarily convict and punish for that offence. The charge made against Stanley might have been lawfully made and heard, without any previous summons or warrant. Hughes might have apprehended Stanley in the act of committing the alleged assault. A magistrate seeing the alleged assault committed, might have, then and there, ordered Stanley into custody, or Stanley, knowing or believing that he would be apprehended if he did not appear, might have appeared voluntarily before the justices to answer the charge; in any of which cases I cannot doubt, but that the justices not only might, but must, have heard the case, and disposed of it somehow. It would be very strange, to say the least of it, if the law be, that notwithstanding the justices would have had jurisdiction to hear the charge if there had not been a warrant, they had no such jurisdiction in consequence of there being a warrant, unsupported by a sworn information. Nothing short of a clear statutory enactment would justify such a conclusion. That there is no such statutory enactment I think is clear. But it is said there are decisions which govern the case. The decision most relied upon on behalf of the prisoner Hughes is *Reg.* v. *Scotton* (1), but it will be seen by examining that case that the very ground upon which it was decided is wanting in the present case. The indictment was for perjury on the hearing before justices of an information laid under 1 & 2 Wm. 4, c. 32, ss. 30 and 41, and the Court held, that the justices had no jurisdiction to hear it, because by s. 9 of 6 & 7 Wm. 4, c. 65, it was expressly made a condition precedent to any further step, beyond the information, that the matter of the information should be deposed to by oath of the informer, or some other credible witness, and no such deposition had been made. Whether that case was rightly decided may, I think, admit of considerable doubt, having regard to the qualified language of the proviso at the end of s. 9, but, assuming the right construction to have been put upon it, there is no such enactment in the present case, or anything like it. I think it unnecessary to review all the cases which were cited in the course of the argument, partly because I do not think any of them are conclusive either way; but mainly because I found my judgment upon this, that the

(1) 5 Q. B. 493; 13 L. J. (M.C.) 58; 1 New Sess. Cas. 27.

provisions contained in the 17th section of the 34 & 35 Vict. c. 112 (which incorporates the 11 & 12 Vict. c. 43) relative to process in proceedings for the purpose of bringing accused persons before justices, are in my opinion directory only, and do not in any way affect the jurisdiction of justices to hear charges made against persons who are before them, and who are accused of offences over which they have jurisdiction. The proviso at the end of s. 1 of 11 & 12 Vict. c. 43, strongly supports this view. We are not told by the learned judge who has stated this case, how the justices dealt with Stanley, but we are informed by counsel at the bar that they convicted him summarily, and sentenced him to imprisonment. In my opinion it is immaterial, for the present purpose, how the justices disposed of the charge, the only question before us being whether the justices had jurisdiction to hear it, and to receive evidence upon oath in support of it. I think they had, and that the question put to us should be answered in the affirmative.

FIELD, J. I am of opinion that this conviction should be affirmed. I do not desire to add anything, except that, after the discussion in the present case, I have again considered the case of case of *Blake* v. *Beech* (1), and with the result that I am unable to alter the view which I then took of that case.

HUDDLESTON, B. The question in this case is: whether a conviction for perjury committed by the prisoner Hughes before justices should be quashed because there was no information on oath for the warrant upon which Stanley, the party charged, was brought before the justices.

The charge against Stanley before the justices was for obstructing Hughes, a police constable, in the discharge (execution) of his duty.

It is not stated in the case under what statute the charge was made against Stanley; it might therefore have been under 34 & 35 Vict. c. 112, s. 12, by which Stanley might be convicted summarily; or it might have been under 24 & 25 Vict. c. 100, s. 38, by which he might have been sent for trial to the assizes or sessions. If the charge be for an offence under the former Act it

(1) 1 Ex. D. 320; 45 L. J. (M.C.)111.

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may, by s. 17, be prosecuted in manner directed by Jervis's Act, c. 43. Sect. 1 of that Act provides that "where an information shall be laid that any person has committed any offence for which he is liable by law on summary conviction, the justice may issue his summons." This is the process by which the person to be charged is called on to appear. By s. 2: If, being served, the party does not appear, a warrant may issue, or a warrant may issue in the first instance if the justice shall think fit; but in both these cases the matter of the information must be substantiated to the satisfaction of the justice by oath, or affirmation, and if the summons is not obeyed the justice may proceed ex parte on proof of due service. By s. 10 it is declared (that is declaratory of the Common Law), and enacted, that the complaint, in case of an order, and the information in case of a summary conviction, shall be made or laid without any oath or affirmation, except where warrants are issued in the first instance to apprehend. And then the matter of the information must be substantiated by the oath or affirmation of the informant. Sect. 13 deals with the appearance or default of the party charged, and provides that the case may be heard in his absence, on due proof of the service of the summons, or a warrant for his apprehension issued and committal, and for the dismissal of complaint or information if the complainant or informant does not appear by himself, counsel or attorney, and for the adjournment of the hearing, and concludes thus "but if both parties appear either personally, or by their respective counsel or attorneys, before the justice or justices who are to hear and determine such complaint or information, then such justice or justices shall proceed to hear and determine the same." The object of all these provisions is to bring the party accused before the justices, to enforce his presence, and to enable them to deal with him in his absence; but when he is before them the justices are required, and shall proceed, to hear and determine.

The information on oath is not necessary to give the justices jurisdiction to try, though it is necessary to give them jurisdiction to issue a warrant to apprehend. The jurisdiction to try arises on the appearance of the party charged, the nature of the charges, and the charging of the defendant. Sect. 14 shews what is to take place at the hearing, "when such defendant shall be present

at such hearing, the substance of the information shall be stated to him" (this is unchanging). The word "state" is important as pointing out that no summons, information, or other document is to be read or shewn to him. An information is nothing more than what the word imports, namely the statement by which the magistrate is informed of the offence for which the summons or warrant is required, and it need not be in writing unless the statute requires. The magistrate to whom it is made is not necessarily, and very often is not, one of the magistrates by whom the case is subsequently heard. In practice an information is never produced before the justices. If in writing it remains with the magistrate granting the summons or warrant, as the warrant remains in the custody of the constable. The clerk to the justices, or the police officer present, states the substance of the information, that is the nature of the charge. Sometimes where there is a charge sheet, as in the metropolitan district, reading from it, otherwise not. The charge sheet is merely the statement drawn up by the inspector at the station of the charge preferred before him. He states in fact the substance of the charge or information, and the prisoner is called on to plead. He may admit the truth and plead guilty, or he may not admit the truth and desire to be tried for it—or he may apply to adjourn, or object to the jurisdiction. But if he make no objection (and here it is found that Stanley made no objection) the case must proceed. Principle and the authorities seem to shew that objections and defects in the form of procuring the appearance of a party charged will be cured by appearance. The principle is, that a party charged should have an opportunity of knowing the charge against him, and be fully heard, before being condemned. If he has the opportunity, the method by which he is brought before the justice cannot take away the jurisdiction to hear and determine, when he is before them. The arrest of Stanley was no doubt illegal, there had been no information on oath to justify the warrant, and it might be, that if the objection had been taken the magistrates might have entertained it, but they could then and there have issued their summons for Stanley's apprehension at once on a verbal information which would be good: *Rex* v. *Fuller* (1); and have proceeded to hear and

(1) 1 Ld. Raym. 509.

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determine, though if the defendant objected, they ought to adjourn, so that he might know the charge and be prepared to meet it. *Rex* v. *Stone* (1) was a conviction on the Game Laws. The objection that there had been no summons was abandoned on argument, and Lord Kenyon, at p. 649, and Mr. Justice Le Blanc, at p. 654, point out that, "Justice requires that a party should be duly summoned, and fully heard, before he is condemned, but if he be present at the time of the proceeding and heard the charge and the witnesses, and not have asked for any further time to bring forward his defence, if he had any, this at all times has been held sufficient." This was the case in which the objection was made to the conviction, that it did not appear on the face of it that the defendant was duly summoned, but the principle is the same. In *Reg.* v. *Shaw* (2), where there was no information of any kind, Erle, C.J., points out that where the parties are before a magistrate who has jurisdiction in respect of time and place (as the magistrates had here), no summons or information is necessary to complete his jurisdiction, unless the obligation is imposed by the statute which constitutes the offence (and certainly that is not imposed by the 11 & 12 Vict. c. 112). Blackburn, J., says no information was required. It is material to know what the charge is (and here the case finds Stanley was charged with obstructing the police constable in the discharge of his duty). Sometimes a summons or other writing may be required, but no antecedent information is necessary. In the absence of one, the party to be tried may, if he pleases, ask for an adjournment; but if he does not do so, the adjudication is good, and Montague Smith, J., says no information or summons is necessary where the party appears voluntarily (and I do not think that it makes any difference, if he be there compulsorily). It is to be observed that this decision was in 1865, and long after Jervis's Act came into operation. Indeed Jervis's Act is referred to by the prisoner's counsel. Mr. Bowen's argument in this case for the necessity of an information is entirely based on Jervis's Act. This case is therefore a distinct authority that the absence of such an information is not fatal to the jurisdiction of the justices. In *Turner* v. *Postmaster-*

(1) 1 East, 639, 648.
(2) 34 L. J. (M.C.) 169, 173; 10 Cox, C. C. 66.

General (1) it was held, that though there was no information on oath (the 62nd section of 24 & 25 Vict. c. 97, the statute on which the defendant was convicted, requiring one), that after appearance, and no objection made, no objection to the jurisdiction of the justices to convict summarily could be taken, and that any defect in bringing the party before the justices was cured by appearance, and the merits of the case being gone into, and that the justices had jurisdiction. *Blake* v. *Beech* (2) is to the same effect. I wish to say that I subscribe to every word in my Brother Field's judgment in that case. The judgments of Cleasby, B., and Grove, J., are based on the ground that the objection to the want of an information was distinctly taken before the magistrates: *Reg.* v. *Berry*. (3) *Reg.* v. *Fletcher* (4) supports the same principle, though they were sought to be distinguished in argument by suggesting that the inquiry on which the perjury was committed was of a quasi-civil nature. The decision in *Reg.* v. *Scotton* (5) was on the ground that, by the words of the statute 6 & 7 Wm. 4, c. 65, s. 9, it was a condition precedent to any further step that the matter of the information should be deposed to on the oath of the informer, or some other credible witness. I think, therefore, that Stanley being before the justices, and no adjournment asked for, and being charged with an offence punishable by summary conviction, though there had been no information on oath for the warrant, that false swearing on a material point would be perjury. The passages quoted in the argument from Paley on Convictions, and Smith's Leading Cases, have reference to the statement of the information in the old form of conviction, where of course it became necessary to shew in that part of the conviction all the ingredients to give jurisdiction. The form of conviction in Jervis's Act omits the information. If the offence with which Stanley was charged was one under 24 & 25 Vict. c. 100, s. 38, for which he might be committed for trial at the assizes or quarter sessions, I entertain no doubt that there need not have been an information on oath

(1) 5 B. & S. 756; 10 Cox, C. C. 15; 34 L. J. (M.C.) 10.

(2) 1 Ex. D. 320; 45 L. J. (M.C.) 111.

(3) 28 L. J. (M.C.) 86; 8 Cox, C. C. 124; 5 Jur. (N.S.) 228.

(4) 40 L. J. (M.C.) 128; Law Rep. 1 C. C. R. 320.

(5) 5 Q. B. 493; 13 L. J. (M.C.) 58; 1 New Sess. Cas. 27.

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or warrant to give the justices jurisdiction to hear, and commit or discharge.

The practice of justices with regard to indictable offences is regulated by Jervis's Act, 11 & 12 Vict. c. 42, s. 8, which provides that where a warrant is to be issued, there must be an information in writing on oath, but not where a summons only is issued.

There is no section pointing out what is to be done at the hearing, as in Jervis's Act, 11 & 12 Vict. c. 43, but the 17th section, which applies to the examination of witnesses, provides, "that where any person shall appear or be brought before any justice charged with any indictable offence, whether such person appear voluntarily upon summons, or have been apprehended, with or without warrant, or be in custody for the same or any other offence, depositions shall be taken, and the oath administered before the witness is examined." The justice here, therefore, has expressly jurisdiction to administer the oath to the witness when the party charged is before him, whether he appear or be brought there, and whether there be, or be not, a warrant, and therefore having jurisdiction to administer an oath, false swearing on a material point would be perjury.

But apart from either statute, I do not think it can be doubted that a police constable would be justified in taking into custody, without summons or warrant, any person who was assaulting and obstructing him in the execution of his duty, and subsequently charging him with that offence.

Upon such a charge being made, although it was entirely false, the magistrate before whom it is made must inquire into its truth, and to do so, must have jurisdiction to administer an oath, and false swearing in that inquiry on a material point would be perjury. In any view, therefore, I am of opinion that the conviction must be affirmed.

DENMAN, J. I conceive the true meaning and effect of the case submitted to us by the learned Lord Justice to be as follows:—

John Stanley was improperly arrested by the defendant Owen Hughes, a constable, who had obtained a form of warrant from the clerk to the clerk of the justices, which was filled up by the clerk, or by Hughes, in the usual form as for a charge of assaulting and

obstructing Hughes, being a constable, in the execution of his duty. This warrant was improperly signed by the magistrate, without requiring any information, either in writing, or upon oath. The magistrates at petty sessions finding Stanley before them, and having been verbally informed, either by Hughes or their own clerk, that Hughes charged Stanley with assaulting him and obstructing him in the execution of his duty, and without inquiring how Stanley had been brought there, administered an oath to Hughes, and took evidence, in the course of which, Hughes committed perjury, if perjury in law could be committed in such a case; the only point raised for our consideration being that the absence of a written information, or of an information upon oath, was fatal to a conviction for perjury. No question was raised at the petty sessions as to the existence of an information, or as to the existence or legality of the warrant, or arrest. These objections were first suggested upon the trial of Hughes for perjury. Stanley made no objection to the charge being heard, and called a witness in his own behalf. He was, in fact, as was admitted upon the argument, though not stated in the case, convicted, and sentenced to six months' imprisonment with hard labour, a sentence which could only have been passed, upon summary conviction under the powers of 34 & 35 Vict. c. 112, s. 12. The case has been twice most ably and elaborately argued, and for some time I doubted whether the conviction could be sustained; but upon full consideration I am satisfied that it ought to stand. The main argument for the defendant was based upon the ground that the offence of which he was convicted was one under statute 34 & 35 Vict. c. 112, s. 12, and that by virtue of s. 17 of that Act, coupled with the provisions of 11 & 12 Vict. c. 43, thereby incorporated, the whole proceeding was void and without jurisdiction for want of an information upon oath. I am of opinion, however, that we ought not to have regard to the conviction, in considering whether perjury was committed, but to look to the moment at which the false evidence was given, and consider whether, at that moment, the magistrates had jurisdiction to hear that evidence judicially. And I think that they had jurisdiction to hear that evidence judicially if, at the time at which it was given, it was evidence which, in any possible event, they

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might have acted upon judicially in a matter within their jurisdiction; whether the result of their acting upon it might have been to convict, or to acquit, or to adjourn, or to send for trial, or to take bail, or to do any other judicial act within their competency. At the moment at which the false evidence in question was given, it appears to me that there was nothing to compel the magistrates to inquire into the mode in which Stanley had been brought before them. If, as I suppose (and here I am putting the case as favourably as it can be put for the defendant), nothing more happened than that the magistrate inquired "what is the charge against that man?" And Hughes said in answer, "I charge him with assaulting me, and obstructing me in the execution of my duty." I apprehend that the magistrates would at once have had jurisdiction to put Hughes upon his oath and inquire into several matters upon any one of which the perjury might have been committed, wholly without reference to what they might in the result feel themselves bound to do, or not to do. For example, they might have inquired into the name and number of Hughes, and whether he was really a member of the police, and actually on duty at the time of the alleged assault, whether Stanley was really the person who had assaulted him or not, how he was dressed, whether he was alone or with others, &c., and, indeed, even if the jurisdiction of the magistrates to convict, depended upon whether he had arrested Stanley in the act, or brought him up upon a legal warrant afterwards obtained, this very question might have been a legitimate subject of inquiry. Considering that this was a case in which Hughes complained of an assault upon himself, it need not have occurred to the magistrates in the first instance that any warrant at all would have been necessary, for there is nothing in any of the statutes to repeal the common law, which would have enabled Hughes, if the charge were a true one, to bring Stanley at once before the magistrates without any warrant at all. The charge actually made, as stated in the case, according to my understanding of it, is much more nearly in accordance with the provisions of 24 & 25 Vict. c. 100, s. 38, than with those of 34 & 35 Vict. c. 112, s. 12. It included a breach of the peace, and I can see no reason why the magistrates, at all events in the absence of any objection on the

ground of the illegality of the arrest, or the want of an information, should not have administered an oath, and inquired into the charge, at all events until any doubt arose as to their jurisdiction to deal with it finally by conviction. It was contended that even under 11 & 12 Vict. c. 42, relating to indictable offences, the right of the magistrates to inquire would not be well founded, in the absence of an information in writing or upon oath; but I am of opinion that there is nothing in that Act to destroy the jurisdiction of the magistrates to inquire into a charge of an indictable offence where the person charged is actually in custody before them. The 1st section of that Act shews that the provisions relating to warrants and informations are not intended to apply to such a case, but are merely provisions for the purpose of bringing people, not already in custody, before the justices. Their jurisdiction to convict appears to me to be a totally different question from the question whether they had jurisdiction to take evidence in such a case, but it is not necessary to consider further the question, whether the conviction was good or bad, and I express no opinion upon it. I cannot hold that the magistrates who tried and convicted Stanley (even if the conviction be one that cannot be supported) had no jurisdiction to administer an oath to Hughes, or that any evidence he gave relevant to a verbal charge of assault and obstruction was coram non judice. The case of *Reg.* v. *Scotton* (1), which at first seemed to me to be in favour of the defendant's contention, is I think clearly distinguishable on the ground that there the Court thought that the only possible foundation of the magistrates' jurisdiction was an information, whereas in the present case there was nothing to prevent the magistrates from proceeding to inquire into a charge which, in at least one other lawful manner, might have been brought before them without any information at all, and either adjudicated upon by them, or sent for trial. In the view I take of this case, it is unnecessary to discuss more fully the contention of the defendants' learned counsel as to the applicability of Jervis's Acts to the case, upon the supposition that because the conviction was one under 34 & 35 Vict. c. 112 no evidence given upon the hearing could be the subject of an indictment for perjury in the absence of an information on oath

(1) 5 Q. B. 493; 13 L. J. (M.C.) 58; 1 New Sess. Cas. 27.

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or in writing. In my view, all that was necessary to give the magistrates jurisdiction to hear evidence was, that there should be before them a person charged with an offence within their general jurisdiction, under such circumstances as to call upon them to take evidence before they could decide whether they should exercise, or abstain from exercising, some legal power which they possessed. For the reasons above given, I think such was the case here and that the evidence falsely and corruptly given upon oath, and which must be taken to have been held by the learned Lord Justice to have been relevant, and material to the subject-matter of inquiry before the justices, cannot be said to have been coram non judice. The indictment, on being referred to, appears to have contained an allegation that the perjury was committed upon the hearing of a "complaint or information," and this is no doubt language which would at first sight lead one to expect that proof would have been given of a charge, made otherwise than in the way in which it appears to me that the case states the charge in this case to have been made. But I do not think that the words "complaint or information" are inconsistent with a verbal charge made under the circumstances suggested above. The statute 14 & 15 Vict. c. 100, s. 20, which is applicable to the case, provides that "in every indictment for perjury it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court or before whom the oath was taken, without setting forth the bill, answer, information, indictment, declaration, or any part of any proceeding, either in law or equity, and without setting forth the commission or authority of the court or person before whom such offence was committed." All that is necessary, since that statute, is that the indictment should shew that there was a proceeding pending before the Court over which the Court had jurisdiction, and I think this does sufficiently appear in the present case, and that it is not necessary to tie down the meaning of the words to any particular form of information or complaint. For these reasons I am of opinion that the conviction ought to be affirmed.

LORD COLERIDGE, C.J. I am desired to state that the Lord Chief Baron dissents from the judgment of the majority of the

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Court. I had myself prepared a judgment, but after having had the advantage of reading the judgment of my Brother Hawkins, I do not think it necessary to read it, as, without binding myself to every single expression used by my Brother Hawkins, I concur in the result he has arrived at, and expressed in forcible language, and in the train of reasoning by which he has arrived at that result. This being also the view of the majority of this Court, the conviction will be affirmed.

Conviction affirmed.

Solicitors for prosecution: *The Solicitors to the Treasury.*

Solicitors for defence: *Simpson, Hammond, & Co., agents for J. W. Hughes, Bangor.*

THE QUEEN ON THE PROSECUTION OF CRISP, APPELLANT; SIR R. WALLACE, RESPONDENT.

March 2.

Highway — Diversion — Validity of Certificate of Justices — 5 & 6 Wm. 4, c. 50, s. 85.

Justices in certifying under 5 & 6 Wm. 4, c. 50, s. 85, that they have viewed a highway proposed to be diverted, and that the proposed new highway is nearer or more commodious to the public, must so certify from their own inspection, and not as the result of inquiries from other persons.

When, therefore, justices certified that the proposed new highway would be more commodious to the public than the present highway because "upon inquiries," they found that the old path was inconvenient, and the new path convenient:—

Held, that the certificate was invalid.

UPON appeal to the Suffolk sessions against an order or certificate of two justices to divert and turn a highway in the parishes of Orford and Sudbourne, the sessions quashed the certificate subject to the opinion of the Court upon a case.

The certificate was in substance as follows: It recited that the two justices, in pursuance of requisitions from the surveyor of highways for each parish respectively to view the highway proposed to be diverted, and also the ground through which a new pathway or highway was intended to be made, on the 1st of April, 1878, jointly made the view required by the surveyors, and upon such joint view it appeared to them that such proposed new pathway or highway would be more commodious to the public than the

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present pathway or highway.—That the owner of the ground through which the new pathway or highway was proposed to be made having consented, &c., the justices directed the surveyors to publish the notices required by 5 & 6 Wm. 4, c. 50 (1), and that the notices were duly published, &c.

The certificate then proceeded: "We do further certify that upon such joint view it appeared that the proposed new pathway or highway leading from Orford to Sudbourne and Chillesford, in the same county, and particularly described in the said notice, will be more commodious to the public than the present highway, because the old path passes at the Orford end through a low part of the park which, upon inquiries, we find in spring and winter is necessarily wet and uncomfortable for walking, and along the Sudbourne portion is very irregular, not only in its direction, but also is made inconvenient by the numerous holes and uneven ground over which it passes, whereas the new path by taking a slight curve from the Orford end avoids the wet ground, and thence continues along the Sudbourne portion in a perfectly straight direction, and is smooth and regular, and a made path, the present one being, in fact, simply a track, the exact direction of which is uncertain, while the new path there is clearly apparent both by night and day, the slight addition in length, of but sixteen yards, being fully and more than compensated for the even and

(1) By 5 & 6 Wm. 4, c. 50, the surveyor of highways is empowered under certain circumstances to apply to two justices to view any highway proposed to be stopped up, diverted, or turned.

By s. 85: When it shall appear upon such view of such two justices made at the request of the surveyor, as aforesaid, that any public highway may be diverted and turned . . . . so as to make the same nearer or more commodious to the public . . . . the justices shall direct the surveyor to affix a notice, &c., and also to insert the same notice in one newspaper, &c., and the said several notices having been so published, and proof thereof having been given to the satisfaction of the justices, and a plan having been delivered to them at the same time . . . . the justices shall proceed to certify under their hands the fact of their having viewed the said highway as aforesaid, and that the proposed new highway is nearer or more commodious to the public, and if nearer the certificate shall state the numbers of yards or feet it is nearer, or if more commodious the reasons why it is so. . . . The certificate, plan, &c., are then to be lodged with the clerk of the peace for the county, to be read at the quarter sessions next after the expiration of four weeks from the making of the certificate.

regular manner in which the new path has been made." Given under our hands, &c.

The sessions decided that the certificate was incomplete and insufficient in not stating that the old pathway or highway was or would become unnecessary.

The appellant also contends that the certificate is insufficient on the ground that the statement therein that the new path will be more commodious, is based partly upon inquiries made by the justices, and it does not unequivocally appear that they acted on their own view and derived their conviction from such view, as required by 5 & 6 Vict. 4, c. 50, s. 85.

The question for the opinion of the Court is, whether the certificate is complete and sufficient.

Poyser, (*Gully, Q.C.*, with him), for the appellant. First, the certificate is defective for ordering that the highway shall be diverted and a new way constructed, without also stating that the old way was unnecessary, and should be stopped up.

[COCKBURN, C.J. Under s. 91 the owner of the land can stop up an old road when the new one is made.]

Secondly, the justices in making their report proceeded upon inquiries and not upon their own inspection. If the justices are at liberty to derive their knowledge from inquiry, they ought at least to give all parties interested an opportunity of being heard. It must appear unequivocally, and not by argument, that the justices acted upon their view: *Rex* v. *Marquis of Downshire* (1); *Rex* v. *Milverton* (2); *Reg.* v. *Jones.* (3)

Bulwer, Q.C. (*Malden*, with him), for the respondent. The only objection taken at the sessions was whether the certificate was defective for not stating that the old pathway was unnecessary, and for that objection there is no foundation. As to the other point, inserted in the case but not raised at the sessions, the justices in their certificate state distinctly that they have viewed both the old and the new way, and that their report is founded upon their view. The mere fact that, on the 1st of April when they viewed, they made inquiries as to the condition of the old path in the winter time cannot affect the validity of the certificate.

(1) 4 A. & E. 698. (2) 5 A. & E. 841.

(3) 12 A. & E. 684.

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COCKBURN, C.J. I regret that we are compelled to come to the conclusion that the certificate cannot be maintained. Two objections have been made to this certificate. First, that the justices while stating that the proposed diversion would be the means of making a road more commodious to the public, should have gone on to say that the old road was unnecessary, and should be stopped up. Upon reference to the different sections of the Act, there appears to be no foundation for this objection, for the simple reason that as soon as the diversion to which the certificate of the justices has reference is established, the old road ceases to be a highway, and the land reverts, unencumbered by any easement, to the original owners of the soil.

But the other objection is that it does not appear upon the certificate that the report, as to the proposed substitution of a new road being more commodious to the public, was the result of the view of the justices themselves. Now I think that the Act requires that the justices shall view, and not only that they shall view, but that they shall certify under their hands the fact of their having viewed, and that upon their view they find that the proposed new highway is more commodious than the existing one. If it be more commodious, they have to set out the reasons why it is more commodious. These reasons must be reasons disclosed by the view upon their own personal inspection, and not from statements by parties who are possibly interested in the result. I do not mean to say that the justices are not at liberty to consult other persons, but it must appear that the view upon which their decision is founded is their own. The certificate does not shew this unequivocally; for the statement "upon inquiries" may refer, not merely to the finding as to the path being wet in spring and winter but, to the other findings as well, and the certificate is therefore defective.

MELLOR, J., concurred.

Judgment for the appellant; Order of Sessions affirmed.

Solicitors for appellant: *Paine, Layton, & Cooper.*
Solicitor for respondent: *Wood, of Woodbridge.*

[IN THE COURT OF APPEAL.]

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Feb. 25.

SHARPE *v.* THE METROPOLITAN DISTRICT RAILWAY COMPANY.

Lands Clauses Consolidation Acts, 1845, 1869—*Costs of Arbitration—Compensation for injuriously affecting Land.*

By a local Act incorporating the Lands Clauses Consolidation Acts, 1845, 1869, the defendants were empowered to lower a street, and compensation was to be assessed by a single arbitrator to be appointed by the Board of Trade. The arbitrator awarded compensation to the plaintiff, who had been injured by the lowering of the roadway, and the plaintiff sued to recover the costs of the arbitration, without having the assessment taxed by a master of the High Court:—

Held, First, that the plaintiff was entitled to costs, for the substitution of a special tribunal was not inconsistent with the provisions of the Lands Clauses Consolidation Acts, 1845, 1869, relating to arbitration, and the right to costs thereby created remained unimpaired; and, secondly, that the taxation was not a condition precedent to the right to sue.

Cited by Hyde 5 Ch Div 425

ACTION to recover the sum of 134*l.*, the costs of an arbitration.

At the trial by Manisty, J., without a jury, during the Michaelmas Sittings in Middlesex, 1878, the following facts were proved. By the Metropolitan District Railway Act, 1875, the defendants were empowered, for the purpose of carrying their railway across Mansion House Street, Hammersmith, to lower the roadway of the street; and in order to compensate the owners and lessees of any houses not purchased by the company abutting on such portion of the street as should be lowered, a clause was inserted (s. 14) making it obligatory upon the defendants to compensate the owners and lessees for deterioration in value, and enacting that the amount of compensation should be determined in case of dispute by a single arbitrator to be appointed by the Board of Trade, to whom all questions of compensation should be referred.

No provision in respect of costs in connection with the determination of the amount of compensation by the arbitrator so to be appointed was contained in the Act.

By s. 2, the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, were incorporated, except where they were expressly varied.

Upon the application of the defendants the Board of Trade appointed an arbitrator to determine all questions of disputed compensation.

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The plaintiff was the occupier of a house in Mansion House Street, which abutted upon a portion of the roadway lowered by the defendants. The plaintiff sent in a claim for compensation in respect of her house, not only as lessee at a rack rent, but also as the owner of the ground lease. The arbitrator awarded 30*l.* for compensation to the plaintiff as lessee at a rack rent. And she failed to prove the rest of her claim.

The award was taken up by the defendants, who paid the 30*l.* The plaintiff claimed costs in respect of the arbitration, and obtained an appointment before the master to tax the same. The defendants objected to the taxation on the ground that the plaintiff was not entitled to any costs, and the master had no jurisdiction. The amount of the costs had never been settled.

The learned judge decided that the plaintiff was entitled to the costs of the arbitration, and ordered that the amount due to the plaintiff should be ascertained by one of the masters of the Queen's Bench Division, and that the taxation should be postponed until after an appeal from his interlocutory judgment should have been decided.

The defendants appealed.

Feb. 24, 25. *Sir H. S. Giffard, S.G.*, and *Pollard*, for the defendants. The question is whether the plaintiff is entitled to costs of and incidental to a certain arbitration, to be ascertained by one of the masters of the Queen's Bench Division, pursuant to an order of Manisty, J. This depends on, first, whether the right to costs exists; secondly, whether the plaintiff can bring an action for mere costs, without their amount being ascertained. But for s. 14 of the private Act, the case would be regulated by s. 68 of 8 & 9 Vict. c. 18. Instead of the elaborate machinery provided by the Lands Clauses Act, this s. 14 provides that a single arbitrator shall be appointed by the Board of Trade, to ascertain any compensation that may be due to parties whose lands are compulsorily taken, and makes no provision as to the payment of costs. This is a particular provision having reference only to two particular streets. The right to compensation does not include the right to costs for obtaining that compensation: *Ex parte Laws.* (1)

(1) 1 Ex. 441; 17 L. J. (Ex.) 126.

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Sect. 14 of the private Act is inconsistent with the Lands Clauses Acts, so far as they relate to arbitration. It is therefore expressly varied within the meaning of s. 2 of the later Act: it is unnecessary it should be repealed in express terms: *Weld* v. *South Western Ry. Co.* (1); *Reg.* v. *Mayor of London.* (2) It was intended by this legislation to exclude the whole of the provisions of the Lands Clauses Act with respect of arbitration, including s. 34. The local statute creates a new tribunal, and the result is that s. 34 of the Lands Clauses Act as to costs does not apply. In order to entitle a party to costs there must be express words giving him costs: *Ex parte Reynal* (3); *Corrigall* v. *Blackwall Ry. Co.* (4); *Reg.* v. *Ingham.* (5)

Secondly, if the plaintiff is entitled to costs, the action is premature. The proper proceeding would be to obtain a mandamus to tax, and before the amount is reduced to an ascertained sum no action will lie. *Holdsworth* v. *Wilson* (6) was decided before the Lands Clauses Act, 1869; now, by that Act, there must be a taxation before the master, and if the plaintiff is entitled to costs the master cannot refuse to tax them: *Lord Fitzharding* v. *Gloucester and Berkeley Canal Co.* (7) At all events the plaintiff is not entitled to any costs as to that portion of her claim in which she failed.

W. G. Harrison, Q.C., and *C. Mann*, for the plaintiff. As to the first point, there is no express variation of the general Act, and therefore the provisions as to costs remain in full force and apply to the arbitration under s. 14. As the plaintiff has done no wrong, she is entitled to the costs of all the proceedings, though she has failed as to a portion of her claim.

As to the second point, the taxation of the costs is not a condition precedent. The right to costs is absolute directly after the award is made under s. 14: *Holdsworth* v. *Wilson.* (6) An action for unascertained costs may be brought: *Lewis* v. *Rossiter* (8); and they can be ascertained by the verdict of a jury.

Sir H. S. Giffard, S.G., in reply. The Lands Clauses Consoli-

(1) 32 Beav. 340; 33 L. J. (Ch.) 142.
(2) Law Rep. 2 Q. B. 292.
(3) 16 L. J. (Q.B.) 304.
(4) 2 Dowl. (N.S.) 851, at p. 876.
(5) 17 Q. B. 884.
(6) 4 B. & S. 1; 32 L. J. (Q.B.) 289.
(7) Law Rep. 7 Q. B. 776.
(8) 44 L. J. (Ex.) 136.

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dation Act, 1845, provides that the costs shall be dealt with in a different manner according to the nature of the claim. Similarly, the legislature may have thought that the arbitrator's costs in assessing the compensation, by going along the street, would be practically nothing. It may be admitted that the arbitrator might make his award as to compensation and costs at different times: *Gould* v. *Staffordshire Potteries Waterworks Co.* (1)

BRETT, L.J. I am of opinion that this judgment, with a slight variation, must be affirmed.

The first question is, whether upon the construction of the local Act the plaintiff is entitled to costs under any circumstances, and in my view that depends upon whether the 34th section of the Lands Clauses Consolidation Act, 1845, can be applied to an arbitration under the 14th section of the local Act, which by s. 2 incorporates that statute. I take the meaning of the legislature to be that the whole of the Lands Clauses Consolidation Act, 1845, is to be read as if it had been re-enacted in the local Act, except such parts as may have been expressly excluded. I agree that the words "expressly excluded" include more than an expressly negative clause, and that they are satisfied if there be any provision in the local Act which is inconsistent with some part of the Lands Clauses Consolidation Act, 1845. We must, therefore, consider this case as though all the provisions of the Lands Clauses Consolidation Act, 1845, had been re-enacted in the local Act, except such of them as may be inconsistent with some clause in the local Act, and we must ascertain whether there exists any such inconsistency as I have mentioned.

It seems to me that if all the provisions of the Lands Clauses Consolidation Act, 1845, had been included in the local statute, there would have been more kinds of arbitration than one, which might have arisen in different states of circumstances. Where lands elsewhere than in Mansion House Street had been purchased, taken, or injuriously affected by the defendants, there might have been, under certain circumstances, an arbitration according to the 34th section of the Lands Clauses Consolidation Act, 1845. But in the 14th section of the local statute pro-

(1) 5 Ex. 214; 19 L. J. (Ex.) 281.

visions are contained as to this street. Apart from the 14th section there might have been an arbitration as to the properties in this street, either if they had been injuriously affected or if they had been taken or purchased; for the 14th section contemplates an injury to land although it is not taken by the company, and it contemplates also the injury to an owner of actually taking his land. Therefore two kinds of arbitration would have been applicable to the properties in these streets under the Lands Clauses Consolidation Act, 1845. Possibly there might have been also a third kind of arbitration, that is, by inquiry before justices. The 14th section has, however, introduced an alteration, and has created a tribunal different from the tribunal which would have jurisdiction under the Lands Clauses Consolidation Act, 1845; the latter statute is therefore expressly varied with regard to the mode of appointment, nevertheless it is an arbitration within the 14th section, it is not even an inquiry before justices. Therefore if the Lands Clauses Consolidation Act, 1845, be read as if it had been re-enacted in this local statute, there will be, as may be properly said, arbitrations under the former Act, that is, for the taking of houses not in the street, and for injuriously affecting property not within the street; and further, there will be arbitrations for injuries of two kinds done in the street, that is, either by lowering the level of the street, although otherwise not wanted for the purposes of the undertaking, or by taking the houses. If the clauses of the Lands Clauses Consolidation Act, 1845, are to be read into the local statute, I see no reason why the 34th section should not be considered as coming either before or after the 14th section, but I confess I should not like to decide the matter upon the mere position of the section. It seems to me, upon this state of things, that the proper mode to read s. 34 is to apply it to all the arbitrations mentioned in what would be in theory only one statute, and therefore the 34th section would be applicable to the arbitrations held under the 14th section of the local statute; there is nothing inconsistent between the provisions of s. 34 and of s. 14. Certainly s. 34 is not expressly excluded by negative words. I admit the authority of *Reg.* v. *Mayor of London* (1), as shewing that if s. 14 of the local Act

(1) Law Rep. 2 Q. B. 292.

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were necessarily inconsistent with s. 34, the latter would be excluded; but I repeat that no inconsistency exists, and I am of opinion that the plaintiff is entitled to these costs.

Then comes the question whether the plaintiff, being entitled to these costs, has brought her action too soon: that depends upon whether the settlement or ascertainment of the amount of costs is a condition precedent to her right to bring this action. It seems to me we must get at the solution of this question by steps. I take it that the real foundation of the judgment in *Holdsworth* v. *Wilson* (1), is contained in the following words. Speaking of an ordinary award by arbitrators not within the Lands Clauses Consolidation Act, 1845, and not a statutory award, Erle, J., said: "When arbitrators award costs, it is meant to be judicially the costs of the litigation, the amount to be ascertained ministerially by the person whom they appoint." In this passage a contrast is drawn between a judicial decision and a ministerial function after that judicial decision; and it is to be observed that he does not use the word "ministerial" there as indicating an officer of the court, for he applies it to an officer to be appointed by the arbitrators. The foundation of the judgment, therefore, is, that where an award decides the matter in contention, and declares that one of the parties is entitled to costs, the decision is judicial upon the controversy between the parties, and upon the right to costs; but the mere ascertainment of the amount of those costs is a ministerial act, to be performed after the close of the award. It was upon this doctrine that the Court held, in *Holdsworth* v. *Wilson* (1), where the award was under certain statutes, that costs being awarded to a successful party, he might bring an action at once, before the amount was ascertained, and the ground of the decision was, that there had been a judicial declaration by a sufficient authority that the successful party was entitled to costs, that the right was thereby determined, and that the mere ascertainment of the amount was a ministerial function. Upon applying this doctrine to the present case, it seems to me that two duties were imposed upon the arbitrator. One duty was to determine judicially between the parties as to the right and the amount of compensation. That was the judicial award which the

(1) 4 B. & S. 1; 32 L. J. (Q.B.) 289.

arbitrator had to make, and that was the only award to be made under the statute. Then without its being necessary for the arbitrator to give a judicial decision that one party was to have costs, the Lands Clauses Consolidation Act, 1845, has declared as matter of law, that upon the arbitrator having made his award in favour of the claimant, the latter is thereby entitled to costs. It is not a judicial, but a statutory declaration as to the right to costs, and the Lands Clauses Act, 1845, put upon the arbitrator the ministerial duty of determining the amount of costs which were due, not by his award, but by the declaration of the statute: under that statute he had two functions—he had the judicial function of arbitrator, and also the ministerial function to settle the amount of costs upon the statutory declaration contained in the statute. Under the Lands Clauses Consolidation Act, 1869, it seems to me that one part of the duties which had been cast upon the arbitrator as a ministerial officer, was transferred to, or at all events shared with, a master, if the parties so chose. I confess that the Act of 1869 seems to me strong to shew that the interpretation I should have put on the Lands Clauses Consolidation Act, 1845, is the interpretation which the legislature itself put upon it. I doubt whether the legislature would have created two proceedings instead of one, if they had thought that the second branch of his functions under the Lands Clauses Consolidation Act, 1845, was a part of his jurisdiction as arbitrator; but when it is considered that the arbitrator had under that statute two functions, it was quite natural that they should transfer the part of his function to an officer who was more accustomed to tax and settle costs. In the result, it seems to me that there is now a declaration by the legislature that upon the decision of the arbitrator on a matter in difference between the parties, the right to costs accrues to the successful party, and also a ministerial duty to ascertain the amount of those costs. Applying this view and the principle of *Holdsworth* v. *Wilson* (1), to the state of facts before us, I think that there is authority for saying that the right to costs which springs from the decision of the arbitrator is established by the statutes, and the moment that the right to the costs is declared, the cause of action accrues, and that all which

(1) 4 B. & S. 1; 32 L. J. (Q.B.) 289.

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remains to be done is a ministerial ascertainment of the amount. The right to the costs accrues before the ministerial function is fulfilled, and may be enforced by action, as was done in *Holdsworth* v. *Wilson*. (1) It follows that the ascertainment of the amount is not a condition precedent to the right to sue, and therefore the plaintiff has not brought her action too soon. The judgment, therefore, is affirmed; but I think it impossible to say that the order is strictly accurate, because I cannot think that if a plaintiff has two distinct heads of claim, upon which he goes to arbitration, and wholly fails in one and succeeds in the other, he is entitled to recover, by virtue of the statute, the costs incurred in that arbitration upon the separate claim upon which he is unsuccessful. I think that this order or declaration of Manisty, J., must be somewhat modified, so as to shew that the costs to which the plaintiff will be entitled will be such costs as the master may settle by taxation, and as were reasonably incurred by the plaintiff in support of the claim for compensation, upon which she has succeeded. But this variation seems to me not a substantial part of this appeal; the plaintiff has substantially succeeded upon the whole appeal, and in my opinion this judgment ought to be affirmed with costs.

COTTON, L.J. I am of the same opinion. The first question is, whether or not the plaintiff is entitled to costs by virtue of the statutes. The claim is in respect of a sum said to be due for the costs of arbitration under s. 14 of the defendants' Act obtained in 1875. That statute makes no mention of costs, and it is clear that the costs not being given under the ordinary jurisdiction of a court of justice, the persons who claim to be entitled to any sum in respect of costs must shew some enactment entitling them to costs. It is, however, contended for the plaintiff that as the defendants' Act incorporates the Lands Clauses Consolidation Act, 1845, she is by one of its sections, namely, s. 34, entitled to costs. Let us consider whether or not that section is incorporated, and if it is, whether or not upon its true construction it does give a right to costs. The Lands Clauses Consolidation Act, 1845, is incorporated by s. 2 of the defendants' Act, except so far as it is

(1) 4 B. & S. 1; 32 L. J. (Q.B.) 289.

expressly varied. In my view the two statutes must not be construed as if they were two separate Acts of Parliament, but they must be read as if they were one Act. The general Act was passed for the purpose of saving the expense which would be incurred, if a special Act incorporated all the provisions which are contained in the general Act, and which are necessary for enabling the promoters of an undertaking to carry into effect the object of the special Act. But the general Act is not to be incorporated by the defendants' Act, where the latter expressly varies it. I take the meaning of this restriction to be that where there is a provision in the special Act relating to the same subject-matter as that with reference to which there is a provision in the general Act which is to be incorporated, and where the two provisions are inconsistent with each other, the provision in the general Act is not to be considered as incorporated; otherwise inconsistent enactments relating to the same subject-matter would be introduced. No doubt s. 14 of the company's Act is to some extent inconsistent with the provisions of the Lands Clauses Consolidation Act, 1845. The inconsistency is that whilst that statute provides certain modes of constituting the tribunal to decide what compensation is to be given either for taking land or for injury thereto, s. 14 constitutes for this purpose as regards certain streets a different tribunal from any of those provided by the general Act. Therefore the latter Act is varied in this respect, that is to say, as regards these streets those provisions of the general Act cannot be deemed to be incorporated, which direct how the tribunal for settling conpensation is to be constituted. The 34th section of the Lands Clauses Consolidation Act, 1845, relates to the costs of arbitration. Is that varied by s. 14 of the defendants' Act? In my opinion it is not. The 14th section contains no provision as to the costs of any claimant coming before the tribunal thereby constituted; but in this respect it is not inconsistent with the provisions of s. 34, which gives the costs of the proceedings before certain tribunals for arbitration. It may well be that s. 14 does not provide for costs because s. 34 does give them. Still that does not settle the question, for we must ascertain whether s. 34 extends to the case of the present plaintiff, and gives her as claimant the costs of the arbitration before the tribunal established

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under s. 14. By force of that section the promoters are to bear the costs, except in certain events which it is unnecessary to further specify. What is the meaning of the words in the enactment, "Any such arbitration?" It is perfectly clear that more than one kind of arbitrations are meant, because several kinds of arbitrations before several kinds of tribunals have been mentioned; and as the Lands Clauses Consolidation Act, 1845, and the defendants' Act are to be read as one statute, the arbitration constituted by s. 14 of the latter Act is an arbitration within s. 34 of the former Act. This I think the fair construction. The defendants' Act does not relate solely to this street. It is a special statute giving the company power to make lines and to buy such property as they required to make the lines, and also in s. 14 giving them power, even although they might not acquire the houses in Mansion House Street for the purpose of making their lines, to buy them to avoid the claim for compensation in respect of those houses for the damage caused by lowering the road. The Lands Clauses Consolidation Act, 1845, is divided into blocks, some relating to the acquisition of land and to the damage of land not required for the purposes of the undertaking, others relating to the disposal of the purchase-money and to other matters. The block beginning at s. 6 and going down to s. 68 relates to taking land or injuriously affecting land, and in order to read the two statutes as one, we should have to introduce into that block a section providing that the company, although they might not require Mansion House Street or the houses in it for the purpose of constructing their works, should be at liberty to buy any house in it which they might think fit, and another section declaring the mode in which the purchase-money to be paid for any house so taken was to be ascertained. We should introduce the first section very early in the block. The company are, by the Lands Clauses Consolidation Act, 1845, to take such land as they may require for the purposes of their undertaking, and it would be necessary to add the words, "And also any houses in Mansion House Street in respect of which any claim shall be made for compensation." Then where shall we introduce the provision as to the tribunal, which is to deal with the question of compensation? I think it would be fairly introduced under those sections, which

constitute the special tribunal of arbitration, and, as far as I can see, s. 28 is the last of those constituting the original tribunal. The statute then provides the mode in which vacancies are to be filled up occasioned by arbitrators dying, arbitrators refusing to act, and various other matters. Then, if we introduce provisions as to this special tribunal in the case of the Mansion House Street, where I have suggested, after and not later than all the other provisions as regards the constitution of the tribunal for arbitration, we shall find, even if we put a restrictive interpretation on s. 34, that it will refer to the costs of such an arbitration as that contemplated by s. 14. That will only be as regards the compensation to be paid for the purchase of any of these houses, and we are not dealing with that question. But then we come to s. 68, which is applicable to consequential injury to land not taken, and then we shall find a right given to claim compensation in respect of such consequential injury, with a special provision that the compensation to be paid in respect of houses in Mansion House Street is to be settled in the manner thereinbefore provided for arbitration in reference to the houses taken in that street, for s. 68 of the Lands Clauses Consolidation Act, 1845, contains similar provisions in respect of consequential injury to those contained in previous sections as to land taken. There is no provision inconsistent with the introduction of s. 34 as regards the determination of the claim to be made in respect of houses in Mansion House Street, and when once we have ascertained that s. 34 is not excluded as a matter of construction, I think the proper interpretation to be that s. 34 does give the plaintiff costs of the arbitration before the special tribunal constituted under s. 14.

Then comes the question, whether this action has been brought prematurely. If the right to a sum of money solely depends upon what shall be awarded by a particular person, and if that person does not award a sum, there can be no valid claim, for the condition precedent to the right to recover has not been fulfilled; for the right to any sum depends entirely upon the decision of one person; and until his judgment has been given no action will lie. On this part of the case I start with the assumption that there is a statutory declaration that the claimant in this particular case is entitled to the costs of, and relating, and incident to, the

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arbitration. Under the Lands Clauses Consolidation Act, 1845, the arbitrator had not to determine whether in a particular case a claimant should have costs, but had only to settle the amount, that is to say, what costs had been reasonably incurred by the claimant in respect of her claim; and then we have the provision contained in the Act of 1869, that if it be required by the company, the costs shall be settled and taxed by one of the masters. I do not propose to examine authorities; but it is well established that the master is not acting as the officer of the Court so as to render his decision subject to the review of the Court, but he is only the person to decide what quantum of costs has been properly incurred. No discretion is left to him to say under the circumstances of the case, "I think the claimant ought to have no costs;" his duty is simply to say what costs have been properly incurred. He may say, "All the costs claimed are improper, and I allow none of them;" but this is not tantamount to deciding that there is no right to costs which have been properly incurred. Whatever technical difficulty there might be before the Supreme Courts of Judicature Acts, 1873, 1875, it is now removed; and the master may now be required to tax the costs. In substance I think the judgment right. Probably from inadvertence the judgment goes rather too far, because it appears to decide that the claimant had a right to all the costs properly incurred by her with reference to the whole arbitration. The decision ought to be confined, as was proposed by Brett, L.J., to all costs with reference to the claim in which she succeeded; she can have no costs in respect of that claim as to which she failed; the arbitration must be treated as a separate proceeding as to that part of her claim. What I suggest as the variation to be made in the order is that she be entitled to the costs of the arbitration so far as it related to the claim, for which she has been awarded the sum of 30*l.*

THESIGER, L.J. Upon the principal matter in dispute between the parties to this case, namely, whether the plaintiff is entitled to costs at all, I can entertain no doubt. Before considering s. 14 of the special Act, upon which the question mainly turns, it is not unimportant to consider generally the position of parties entitled

to compensation under the Lands Clauses Consolidation Act, 1845. That statute dealt with two matters. In the first place, it empowered the railway company to take lands for the purposes of the undertaking; and, secondly, it contemplated that in the course of taking lands for the purposes of their undertaking they might and probably would injuriously affect other lands. In respect of both those kinds of injury the persons injured by the defendants' works are clearly entitled to compensation, because s. 2 of the special Act incorporates, amongst others, the Lands Clauses Consolidation Act, 1845; and by that Act machinery is provided for the purpose of assessing the compensation in respect of both kinds of injuries to which I have referred. Now the Lands Clauses Consolidation Act, 1845, enables compensation to be obtained by different modes of assessment. In the case of injuries affecting land under s. 68 of the Lands Clauses Consolidation Act, 1845, or in the case of purchase of land and consequential damage done to the person whose lands are purchased, the machinery provided is threefold. If the claim is under 50*l.*, the claimant must go before justices and obtain an assessment of compensation. If the claim is over 50*l.*, the claimant has his choice of two methods of having his compensation assessed; either he may go before a jury or he may obtain an arbitration. That arbitration again divides itself into two kind of arbitrations, namely, first, the case where the parties concur in the appointment of a single arbitrator; and, secondly, the case where they do not concur in the appointment of a single arbitrator, in which case the matter will be dealt with by two arbitrators or by their umpire.

This being the position of claimants whose property is taken or injuriously affected under the Act of 1845, we start with an à priori argument in favour of the view that persons injured by an undertaking are entitled to compensation; and, as a consequence, we should expect clear words either to take away the compensation which is generally given, or to take away the costs which follow in the event of the claim for compensation being successful. In the first place, let us see what is the character of the special exception made by s. 14 of the defendants' Act. The persons referred to in that section are those whose houses are situated in two specified streets, and who have suffered injury in respect of

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the deterioration in value, if any, which might be caused to their houses by reason of the lowering which was authorized by that Act in both or either of those streets. Stopping here, I think it clear that although the legislature in s. 14 has specially mentioned this particular kind of injury, it is at the same time one which is included in the general words of s. 68 of the Lands Clauses Consolidation Act, 1845. In my view *Moore* v. *Great Southern and Western Ry. Co. of Ireland* (1) decided that point; but whether it did or not, it seems clear that the point has been decided by *Metropolitan Board of Works* v. *M'Carthy* (2), because the principle laid down in that case was this: that where there has been an interference with a right of way, for instance, be it public or be it private, which beneficially before the special Act of Parliament affected a particular house, so as to give an additional value to that house, if by reason of the interference with that right of way, public or private, the house is lessened in value as property in the hands of any person who may be the owner of that house, in that case a claim to compensation arises. This was admitted on behalf of the defendants; but it was argued for them that as the lowering of Mansion House Street was a kind of injury already included in the Lands Clauses Consolidation Act, 1845, s. 68, the circumstance of including it within s. 14 of the defendants' Act indicates an intention of the legislature to make a difference as regards the property in that street, and to take it out of the general rule.

That argument is correct; but it is also correct that s. 14 specifically indicates at all events one matter in respect of which the legislature intended that there should be a difference, and therefore there is no reason why, unless we find express words, we should go further than the matter in which a difference is indicated. Here the difference is, that instead of going before a jury, or arbitrators and an umpire, or a single arbitrator chosen by the parties, the legislature, as regards Mansion House Street, has constituted a special tribunal consisting of an arbitrator appointed by the Board of Trade; but no inference can be drawn that the legislature intended to take away the costs from the claimants in the event of their going before that special tribunal. It may be said

(1) 10 Ir. Com. Law Rep. (N.S.) 46. (2) Law Rep. 7 H. L. 243.

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that the property in the street involved but small claims, and that it was important that costs should not be incurred as to them; that may be true, but, on the other hand, it may be said that this special tribunal was intended to deal with the claims in a more expeditious manner than if there were several separate tribunals, and in a less expensive manner, and that it by no means follows that, although the expenses may be less, the claimant should be deprived of them altogether. There is one part of s. 14 which would shew the injustice of holding that claimants are excluded from costs because the company have not only power to injuriously affect houses situate in this street, but also have the power, if they wish to avoid the payment of compensation for injuriously affecting them, to insist upon taking them altogether. Whether the property is small or large, it is unjust that, while claimants in respect of property along other parts of the line are entitled to compensation and costs, the owners of houses in these two streets are not entitled to any costs. There being no reason why the right to costs should be excluded, can we find any provision in the section which indicates that there would be an inconsistency between the two statutes if the costs were allowed to the plaintiff? I can find none. It has been contended on the part of the defendants that the fact of constituting this special tribunal is to do away entirely with the whole of the sections of the Lands Clauses Act relating to arbitration. The answer to that is manifest. Without many of those sections this particular arbitration could not be carried on. Suppose the arbitrator named by the Board of Trade were to die, what power is there to appoint another, unless the 29th section of the Lands Clauses Act applied. The arbitrator is to make some declaration, or to take an oath. What declaration or oath is provided, except by s. 33 of the Act? The arbitrator must have power of calling witnesses before him, and of calling for the production of documents; what power is given in that respect to him, unless s. 32 of the Lands Clauses Act applies? Finally, how is the award to be made and enforced, unless ss. 35 and 36 of the Lands Clauses Act are incorporated with the special Act? If this be so, what ground can there be for contending that there is any greater inconsistency in incorporating with s. 14 of the defendants' Act s. 34 of the Lands Clauses Act than

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in incorporating the other sections to which I have referred. All those sections commence with the use of relative terms referring no doubt to the previous sections of the Lands Clauses Act, but if they are read into the special Act there is no difficulty in holding that the arbitration which is referred to in s. 14 may be the antecedent of s. 34. The substance of the matter seems to be this; the legislature has thought fit to deal in a special manner with the injuries arising in the street, in other words it has put into plain and particular language what is couched in general language in s. 68 of the Lands Clauses Act: so far there is a change. But by s. 68 there would have been the right to compensation and to costs; by s. 25 the parties may agree upon a single arbitrator, or may have two arbitrators and an umpire. The legislature has thought proper to make a special tribunal, and instead of the single arbitrator agreed upon by the parties it says there shall be one arbitrator named by the Board of Trade: insert those words in s. 25 of the Lands Clauses Act, and the matter is plain. All the machinery that would apply to the arbitrators mentioned in s. 25 and the following sections would be equally applicable to the arbitration which is commenced by the appointment of an arbitrator by the Board of Trade. I think, therefore, the plaintiff has a clear right to recover the costs of the arbitration.

Then has she been premature in bringing this action? On that point I must confess that I have had some difficulty. If the matter had arisen before the Judicature Acts, I do not see how an action could have been brought to recover costs under an arbitration where no costs have been ascertained; certainly I should have felt a difficulty in saying that it could be done apart from the authority of *Holdsworth* v. *Wilson* (1), because the claimant is not left without remedy. The plaintiff in this case had a perfect right to get the costs taxed by a master of the High Court. If he refused to tax the costs, she would be able to apply for a mandamus to compel him to do so. If he was willing to tax, she might have brought the action after taxation: but on the other hand it seems manifestly most reasonable that, where there is a dispute as to the liability to any costs on the part of the railway company, there should be a method of ascertaining the right

(1) 4 B. & S. 1.

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before the costs are settled which may turn out to be a useless form; and unless I can see very clearly that this course cannot be taken, I shall hold that it can be taken. *Holdsworth* v. *Wilson* (1), although not, as regards the facts, identical with the present case, certainly lays down principles wide enough to include this case, and I am prepared to hold that the learned judge was right and that the plaintiff was entitled to these costs subject to the mere ministerial act of assessing their amount. It appears to me that, with a modification to which reference has been made, the judgment of the Court below should be affirmed.

Judgment affirmed. (2)

Solicitor for plaintiff: *T. Noton.*

Solicitors for defendants: *Baxters & Co.*

[IN THE COURT OF APPEAL.]

May 30.

DREW *v.* NUNN.

Lunatic—Principal and Agent—Contract made with Agent of Lunatic—Notice to Contractee of Termination of Agent's Authority.

15 CLD 346
64 BD. 702

The plaintiff was a tradesman, and the defendant had given his wife authority to deal with the plaintiff, and had held her out as his agent and as entitled to pledge his credit. Afterwards, the defendant became insane, and whilst his malady lasted, his wife ordered goods from the plaintiff, who accordingly supplied them. At the time of supplying the goods the plaintiff was unaware that the defendant had become insane. The defendant afterwards recovered his reason, and then refused to pay for the goods supplied to his wife by the plaintiff:—

Held, that the defendant was liable for the price of the goods.

THIS was an action brought by a tradesman to recover the price of goods supplied to the defendant's wife upon her order whilst the defendant was insane. The following facts were proved at the trial before Mellor, J.

The wife of the defendant began to deal with the plaintiff in

(1) 4 B. & S. 1.

(2) The judgment of the Court of Appeal (the formal parts being omitted) was drawn up as follows:—

"It is ordered that the appeal herein be dismissed with costs, and that the judgment given by the Hon. Mr. Justice Manisty on the trial of this action be amended by restricting the said judgment to such costs as related to the claim, in respect of which the plaintiff had been awarded compensation."

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1872; the defendant had been present when some of the goods were ordered by his wife, and also had paid for some of them. The defendant became ill in 1873, and in the month of November he instructed his agent to pay all his income to his wife, and empowered her to draw cheques upon his bankers. He became insane in December, and was confined in an asylum until April, 1877. Whilst the defendant was in the asylum, his wife ordered goods from the plaintiff, who supplied them to her upon credit. The plaintiff was ignorant that the defendant was insane and had been placed under restraint in an asylum, and he did not know that the defendant's income was paid to his wife. In April, 1877, the defendant recovered the use of his reason, and in the June following revoked any authority which he might have given to his wife either to act as his agent or to pledge his credit.

Mellor, J., refused to ask the jury whether the income of the defendant's wife during his confinement in the asylum was sufficient to maintain her, and directed the jury that the plaintiff was entitled to recover, if what the defendant's wife did was according to the course pursued whilst the defendant lived with her. The jury found a verdict for the plaintiff.

The defendant applied to the Queen's Bench Division for a new trial; but the application was refused. Upon appeal to this Court, an order nisi for a new trial was granted upon the ground of misdirection.

1878. Nov. 22. *Willis, Q.C.* (*R. O. B. Lane*, with him), for the plaintiff, shewed cause. The direction of Mellor, J., was right. Insanity does not revoke an authority to pledge the credit of the person becoming insane, if the person giving credit is unaware that it has supervened. The defendant had so conducted himself that the plaintiff was entitled to assume that the defendant's wife was authorized to act as his agent, and therefore *Jolly* v. *Rees* (1) has no application to the present case, which falls within the principle to be deduced from *Ryan* v. *Sams*. (2) A lunatic is liable upon a reasonable contract entered into by him, if the contractee did not know

(1) 15 C. B. (N.S.) 628; 33 L. J. (C.P.) 177. 10 Jur N.S. 319

(2) 12 Q. B. 460; 17 L. J. (Q.B.) 271.

that he was insane: *Browne* v. *Joddrell* (1); *Baxter* v. *Earl of Portsmouth* (2); *Molton* v. *Camroux*. (3) In this case, the plaintiff did not know that the defendant was insane, and therefore it does not fall within the principle acted upon by Patteson, J., in *Dane* v. *Viscountess Kirkwall*. (4) Even in equity the contract of a lunatic could not be set aside, if it was fair and had been entered into without notice of his malady: *Niell* v. *Morley*. (5) It has been said that a lunatic cannot appoint an agent; but this doctrine must be taken subject to some limitation. In *Stead* v. *Thornton* (6), the defendant at the time when he received the money must have known that his alleged principal was insane. It was said by Parke, B., in *Tarbuck* v. *Bispham* (7), that "a lunatic is not competent to appoint an agent;" but this dictum was merely intended to point out that, after insanity has supervened, the person afflicted cannot appoint an agent. It was decided in *Read* v. *Legard* (8) that a husband is liable for necessaries supplied to his wife during the period of his lunacy; but it may be conceded for the plaintiff, that that case is not material here, because it was decided upon the ground of the relation existing between husband and wife; and upon a similar principle, in *Richardson* v. *Du Bois* (9), it was decided that an insane husband was not liable, he not having held out to the plaintiff his wife as his agent. In *Davidson* v. *Wood* (10) proof was allowed against the estate of a testator for money advanced to his wife during his lunacy and applied by her in payment of her expenses.

[BRAMWELL, L.J. *Davidson* v. *Wood* (10) is not in point for the case before us; it was simply a case of liability in respect of necessaries, and in equity, although not at law, a husband was bound to repay money advanced to her in order to be expended in necessaries. (11)]

The defendant's counsel may rely upon Story on Agency

(1) Mood. & M. 105.
(2) 5 B. & C. 170; sub nom. *Bagster* v. *Earl of Portsmouth*, 7 D. & R. 614.
(3) 2 Ex. 487; 18 L. J. (Ex.) 68, in Ex. Ch. 4 Ex. 17; 18 L. J. (Ex.) 356.
(4) 8 C. & P. 679.
(5) 9 Ves. 478.
(6) 3 B. & Ad. 357, n.
(7) 2 M. & W. 2, at p. 8.
(8) 6 Ex. 636; 20 L. J. (Ex.) 309.
(9) Law Rep. 5 Q. B. 51.
(10) 1 D. J. & S. 465; 32 L. J. (Ch.) 400.
(11) See *Jenner* v. *Morris*, 3 D. F. & J. 45; 30 L. J. (Ch.) 361.

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ch. xviii. par. 481, but the authorities cited in the note thereto (7th ed.) seem to throw doubt upon the doctrine laid down in the text. The authorities are collected in Chitty on Contracts, ch. ii. p. 133 (10th ed.), and they shew plainly that a lunatic is liable upon a contract into which he enters with a person dealing with him bonâ fide. In *Manby* v. *Scott* (1) three of the judges held that an idiot was liable for necessaries supplied to him as a housekeeper.

Horne Payne, for the defendant. Mellor, J., misdirected the jury. Upon the facts proved the plaintiff was not entitled to a finding in his favour. The general rule is that a lunatic cannot enter into contract; he may be liable for necessaries, but it is not found that the goods supplied were necessaries for the defendant's wife. A lunatic is incapable of contracting marriage: *Browning* v. *Reane* (2); he cannot bind himself by any contract which may impose a burden upon him: *Howard* v. *Digby* (3); he cannot appoint an agent: *Stead* v. *Thornton* (4); *Tarbuck* v. *Bispham* (5). In Story on Agency, ch. ii. par. 6, it is laid down in broad terms that idiots and lunatics are wholly incapable of appointing an agent. A man incapable of managing his affairs, and of judging of the consequences of his acts, ought not to be held responsible upon contracts for goods which are not necessaries. Upon the death of the principal, the authority of the agent is terminated: a wife cannot bind her husband's estate after his death: *Blades* v. *Free* (6); nor is a wife personally liable who contracts upon her husband's behalf in ignorance of his decease: *Smout* v. *Ilbery*. (7) A similar principle ought to be applied in the present case. A lunatic is as incapable of acting as if he were dead, and he ought not to be held responsible for the acts of an agent appointed whilst he was sane. Owing to his mental weakness he has no power of controlling the agent, or of disavowing acts alleged to be done upon his behalf.

Cur. adv. vult.

1879. May 30. The following judgments were delivered:—

BRETT, L.J. This appeal has stood over for a long time,

(1) 1 Sid. 112.
(2) 2 Phillim. Eccl. Cas. 69.
(3) 2 Cl. & F. 634, at p. 661.
(4) 3 B. & Ad. 357, n.
(5) 2 M. & W. 2, at p. 8, per Parke, B.
(6) 9 B. & C. 167.
(7) 10 M. & W. 1.

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principally on my account, in order to ascertain whether it can be determined upon some clear principle. I have found, however, that the law upon this subject stands upon a very unsatisfactory footing.

The action was tried before Mellor, J., and was brought to recover the price of boots and shoes supplied by the plaintiff to the defendant's wife whilst the defendant was insane. It is beyond dispute that the defendant, when sane, had given his wife absolute authority to act for him, and held her out to the plaintiff as clothed with that authority. Afterwards the defendant became insane so as to be unable to act upon his own behalf, and his insanity was such as to be apparent to any one with whom he might attempt to enter into a contract. Whilst he was in this state of mental derangement, his wife ordered the goods from the plaintiff, who had no notice of the defendant's insanity, and was supplied with them by him. The defendant was for some time confined in a lunatic asylum, but he afterwards recovered his reason, and he has defended the action upon the ground that by his insanity the authority which he gave to his wife was terminated, and that he is not liable for the price of the goods supplied pursuant to her order. Mellor, J., left no question to the jury as to the extent of the defendant's insanity, but in effect directed them as matter of law that the plaintiff was entitled to recover. I think it must be taken that the defendant's insanity existed to the extent which I have indicated.

Upon this state of facts two questions arise. Does insanity put an end to the authority of the agent? One would expect to find that this question has been long decided on clear principles; but on looking into Story on Agency, Scotch authorities, Pothier, and other French authorities, I find that no satisfactory conclusion has been arrived at. If such insanity as existed here did not put an end to the agent's authority, it would be clear that the plaintiff is entitled to succeed; but in my opinion insanity of this kind does put an end to the agent's authority. It cannot be disputed that some cases of change of status in the principal put an end to the authority of the agent: thus, the bankruptcy and death of the principal, the marriage of a female principal, all put an end to the authority of the agent. It may be argued that this result

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follows from the circumstance that a different principal is created. Upon bankruptcy the trustee becomes the principal; upon death the heir or devisee as to realty, the executor or administrator as to personalty; and upon the marriage of a female principal her husband takes her place. And it has been argued that by analogy the lunatic continues liable until a fresh principal, namely, his committee, is appointed. But I cannot think that this is the true ground, for executors are, at least in some instances, bound to carry out the contracts entered into by their testators. I think that the satisfactory principle to be adopted is that, where such a change occurs as to the principal that he can no longer act for himself, the agent whom he has appointed can no longer act for him. In the present case a great change had occurred in the condition of the principal: he was so far afflicted with insanity as to be disabled from acting for himself; therefore his wife, who was his agent, could no longer act for him. Upon the ground which I have pointed out, I think that her authority was terminated. It seems to me that an agent is liable to be sued by a third person, if he assumes to act on his principal's behalf after he had knowledge of his principal's incompetency to act. In a case of that kind he is acting wrongfully. The defendant's wife must be taken to have been aware of her husband's lunacy; and if she had assumed to act on his behalf with any one to whom he himself had not held her out as his agent, she would have been acting wrongfully, and, but for the circumstance that she is married, would have been liable in an action to compensate the person with whom she assumed to act on her husband's behalf. In my opinion, if a person who has not been held out as agent assumes to act on behalf of a lunatic, the contract is void against the supposed principal, and the pretended agent is liable to an action for misleading an innocent person.

The second question then arises, what is the consequence where a principal, who has held out another as his agent, subsequently becomes insane, and a third person deals with the agent without notice that the principal is a lunatic? Authority may be given to an agent in two ways. First, it may be given by some instrument, which of itself asserts that the authority is thereby created, such as a power of attorney; it is of itself an assertion by the

principal that the agent may act for him. Secondly, an authority may also be created from the principal holding out the agent as entitled to act generally for him. The agency in the present case was created in the manner last-mentioned. As between the defendant and his wife, the agency expired upon his becoming to her knowledge insane; but it seems to me that the person dealing with the agent without knowledge of the principal's insanity has a right to enter into a contract with him, and the principal, although a lunatic, is bound so that he cannot repudiate the contract assumed to be made upon his behalf. It is difficult to assign the ground upon which this doctrine, which however seems to me to be the true principle, exists. It is said that the right to hold the insane principal liable depends upon contract. I have a difficulty in assenting to this. It has been said also that the right depends upon estoppel. I cannot see that an estoppel is created. But it has been said also that the right depends upon representations made by the principal and entitling third persons to act upon them, until they hear that those representations are withdrawn. The authorities collected in Story on Agency, ch. xviii. § 481, p. 610 (7th ed.), seem to base the right upon the ground of public policy: it is there said in effect that the existence of the right goes in aid of public business. It is however a better way of stating the rule to say that the holding out of another person as agent is a representation upon which, at the time when it was made, third parties had a right to act, and if no insanity had supervened would still have had a right to act. In this case the wife was held out as agent, and the plaintiff acted upon the defendant's representation as to her authority without notice that it had been withdrawn. The defendant cannot escape from the consequences of the representation which he has made; he cannot withdraw the agent's authority as to third persons without giving them notice of the withdrawal. The principal is bound, although he retracts the agent's authority, if he has not given notice and the latter wrongfully enters into a contract upon his behalf. The defendant became insane and was unable to withdraw the authority which he had conferred upon his wife: he may be an innocent sufferer by her conduct, but the plaintiff, who dealt with her bonâ fide, is also innocent, and where one of two persons both innocent

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must suffer by the wrongful act of a third person, that person making the representation which, as between the two, was the original cause of the mischief, must be the sufferer and must bear the loss. Here it does not lie in the defendant's mouth to say that the plaintiff shall be the sufferer.

A difficulty may arise in the application of a general principle such as this is. Suppose that a person makes a representation which after his death is acted upon by another in ignorance that his death has happened: in my view the estate of the deceased will be bound to make good any loss, which may have occurred through acting upon that representation. It is, however, unnecessary to decide this point to-day.

Upon the grounds above stated I am of opinion that, although the authority of the defendant's wife was put an end to by his insanity, and although she had no authority to deal with the plaintiff, nevertheless the latter is entitled to recover, because the defendant whilst he was sane made representations to the plaintiff, upon which he was entitled to act until he had notice of the defendant's insanity, and he had no notice of the insanity until after he had supplied the goods for the price of which he now sues. The direction of Mellor, J., was right.

BRAMWELL, L.J. I agree with the judgment just delivered by Brett, L.J. It must be taken that the defendant told the plaintiff that his wife had authority to bind him; when that authority had been given, it continued to exist, so far as the plaintiff was concerned, until it was revoked and until he received notice of that revocation. It may be urged that this doctrine does not extend to insanity, which is not an intentional revocation; but I think that insanity forms no exception to the general law as to principal and agent. It may be hard upon an insane principal, if his agent abuses his authority; but, on the other hand, it must be recollected that insanity is not a privilege, it is a misfortune, which must not be allowed to injure innocent persons: it would be productive of mischievous consequences, if insanity annulled every representation made by the person afflicted with it without any notice being given of his malady. If the argument for the defendant were correct, every act done by him or on his behalf after

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he became insane must be treated as a nullity. The limits of the doctrine as to the liability of an insane person may be uncertain, and it may not be possible to lay down any broad rule; but I think that the facts before us resemble the case of a guarantee. Suppose that a promise is made that, if the promisee will supply goods to a person named, the promisor will see that they are paid for, and suppose that the promisor intends to put an end to his liability, but that before he can give notice to the promisee, the latter supplies goods to the person named; surely the promisor is liable for the price; for the transaction between the promisor and promisee was equivalent to an agreement or license which was to continue to exist, until it should be revoked by the promisor, and until notice of that revocation should be received by the promisee.

It has been assumed by Brett, L.J., that the insanity of the defendant was such as to amount to a revocation of his wife's authority. I doubt whether partial mental derangement would have that effect. I think that in order to annul the authority of an agent, insanity must amount to dementia. If a man becomes so far insane as to have no mind, perhaps he ought to be deemed dead for the purpose of contracting. I think that the direction of Mellor, J., was right.

BRETT, L.J. I am requested by Cotton, L.J., to state that he agrees with the conclusion at which we have arrived; but that he does not wish to decide whether the authority of the defendant's wife was terminated, or whether the liability of a contractor lasts until a committee has been appointed. He bases his decision simply upon the ground that the defendant, by holding out his wife as agent, entered into a contract with the plaintiff that she had authority to act upon his behalf, and that until the plaintiff had notice that this authority was revoked he was entitled to act upon the defendant's representations.

I wish to add that if there had been any real question as to the extent of the defendant's insanity, it ought to have been left to the jury; and that as no question was asked of the jury, I must assume that the defendant was insane to the extent which I have mentioned. I may remark that from the mere fact of mental derangement it ought not to be assumed that a person is incom-

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petent to contract; mere weakness of mind or partial derangement is insufficient to exempt a person from responsibility upon the engagements into which he has entered.

Appeal dismissed.

Solicitor for plaintiff: *Alfred E. Copp.*
Solicitors for defendant: *Blake & Weall.*

1878
Dec. 5.

[IN THE COURT OF APPEAL.]

THE HYDRAULIC ENGINEERING COMPANY, LIMITED, *v.* McHAFFIE, GOSLETT, & CO.

Contract, Construction of—"As soon as Possible"—Damages, Measure of—Breach of Contract to manufacture Specified Article—Loss of Profit.

The plaintiffs, in July, 1877, contracted with J. to make for him a machine, to be delivered at the end of August. The defendants contracted with the plaintiffs to make "as soon as possible" part of the machine called a "gun." The defendants were aware that the machine was wanted by J. at the end of August, but they did not finish the "gun" until the latter part of September. J. then refused to accept the machine from the plaintiffs. The delay on the part of the defendants was owing to the circumstance that at the time of undertaking to manufacture the "gun" they had not a foreman competent to prepare certain patterns, without which it could not be made:—

Held, that the defendants had committed a breach of their contract, and that the plaintiffs were entitled to recover damages for the loss of profit upon the contract with J., and for the expenditure uselessly incurred by them in making other parts of the machine.

Attwood v. *Emery* (1 C. B. (N.S.) 110; 26 L. J. (C.P.) 72) commented on.

ACTION to recover damages for breach of contract.

At the trial before Field, J., without a jury, at the sittings in Middlesex, during June, 1878, the following facts were proved:—

In June and July, 1877, the plaintiffs were negotiating with Justice for the supply to him at the end of August of a machine for driving piles into the soil called a "gunpowder pile driver," the force being supplied by means of a "gun." It was proposed that this "gun" should be manufactured by the defendants. Justice accordingly introduced the plaintiffs' manager to the defendants' firm, and they were informed that the machine was wanted by Justice at the end of August. Some conversation and correspondence ensued, the effect of which was, according to the plaintiffs,

that it was agreed the "gun" should be made within four weeks from the delivery of the final order to proceed: according to the defendants it was agreed that the "gun" should be finished "as soon as possible." The final order to proceed was received by the defendants from the plaintiffs upon the 26th of July. The defendants were not ready to deliver the gun until the latter part of September. The sole cause of the delay was, that at the time of entering into the contract the defendants had not in their employ a foreman capable of making certain patterns necessary for the manufacture of the "gun." The plaintiffs were not aware of this circumstance. Owing to the delay of the defendants in manufacturing the "gun" the plaintiffs were not ready to deliver the machine to Justice until the end of September; and Justice then refused to accept the machine. The plaintiffs claimed as damages the profit which they would have derived from their contract with Justice, the expenditure incurred in making the other parts of the machine, the cost of painting it to preserve it, and of warehousing it.

During the trial it was arranged that the defendants should take the machine and make the best sale of it that they could. The machine was of peculiar construction, and one for which no market could be found, and was only of use as old iron.

Field, J., was of opinion that even if it were assumed that the defendants' contract was to make the "gun" as soon as possible, they had not fulfilled it; for from the use of these words the plaintiffs might reasonably assume that the defendants had at the time all reasonable appliances to enable them to proceed without delay, whereas the defendants, by a circumstance within their own control, were prevented from setting to work with fair and reasonable diligence. He also held that the plaintiffs were entitled to recover for the expenditure which they had uselessly incurred, for the loss of profit upon the contract with Justice, and for the cost of painting, but not for the cost of warehousing the machine. The damages assessed upon this basis came to 165*l.*

The defendants appealed.

Murphy, Q.C., and *C. J. Peile*, for the defendants. The judgment of Field, J., cannot be sustained; for the defendants were entitled

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to judgment; and, moreover, even if the plaintiffs could succeed upon the facts proved, the damages have been awarded to them upon a wrong principle.

It may be admitted on behalf of the defendants that, if they are to be taken to have warranted at the time of entering into the contract that they then had proper appliances for carrying it out, the view adopted in the judgment of Field, J., could not be withstood; but it is submitted that he did not construe the contract rightly. This case is not distinguishable in principle from *Attwood* v. *Emery* (1), where it was held that a contract to supply goods "as soon as possible" is a contract to supply them without unreasonable delay, with reference to the means of executing the order and the amount of work on hand for other persons. "As soon as possible" does not mean "within a reasonable time," but "as soon as I possibly can."

As to the principle upon which damages ought to be assessed, *Hadley* v. *Baxendale* (2) laid down that a party to a contract can only be held liable for such consequences of its breach as may be reasonably supposed to have been in the contemplation of both parties, and that he is not responsible for consequences which do not naturally flow from the breach, unless they are communicated to him: but it is further contended that the mere fact of communicating these consequences to him will not render him responsible for them, unless he undertakes to be liable for them; this view of the law is favoured by *Elbinger Actien-Gesellschafft* v. *Armstrong* (3); *Horne* v. *Midland Ry. Co.* (4) General notice is not sufficient to fix the contractor with liability: *British Columbia Saw Mill Co.* v. *Nettleship* (5); he is only responsible for such consequences as he may be taken to have contemplated from the nature of the work to be done: *Cory* v. *Thames Ironworks Co.* (6). The plaintiffs may rely upon *Simpson* v. *London and North Western Ry. Co.* (7), but it is distinguishable because the action was against carriers.

Talfourd Salter, Q.C., and *R. S. Wright*, for the plaintiffs, were

(1) 1 C. B. (N.S.) 110; 26 L. J. (C.P.) 73.
(2) 9 Ex. 341; 23 L. J. (Ex.) 179.
(3) Law Rep. 9 Q. B. 473.
(4) Law Rep. 8 C. P. 131.
(5) Law Rep. 3 C. P. 499.
(6) Law Rep. 3 Q. B. 181.
(7) 1 Q. B. D. 274.

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directed to confine their argument to the question, whether the damages had been properly assessed. Upon the facts proved, it is plain that the defendants were aware of the purpose for which the "gun" was wanted; therefore they are liable for the loss which the plaintiffs have sustained by the refusal of Justice to accept the machinery: *Wilson* v. *General Screw Collier Co.* (1) The doctrine of *Hadley* v. *Baxendale* (2), which was an action against a carrier, is not to be extended to cases, where the contract is for the delivery by one of the contracting parties to the other of a specific article, intended for a particular purpose known to both of them: *Smeed* v. *Foord.* (3)

C. J. Peile, in reply.

BRAMWELL, L.J. I think that this judgment must be affirmed. I quite agree with Field, J., in his construction of this contract. The defendants contend that the contract is to be construed as if it merely bound them to deliver the gun "as soon as possible;" and it was upon this ground that the judgment of Field, J., proceeded: but the defendants also in effect contend that these words must be construed as meaning "as soon as I possibly can." I cannot agree with this argument: to do a thing "as soon as possible" means to do it within a reasonable time, with an undertaking to do it in the shortest practicable time. In *Attwood* v. *Emery* (4), the expressions of eminent judges seem to favour a different view as to the construction of the words "as soon as possible." I quite agree that a manufacturer or tradesman is not bound to discard all other work for the occasion, in order to take in hand a thing which he promises to do "as soon as possible": for instance, a tailor, who accepts an order to make a coat "as soon as possible," need not put down a half-made vest in order to begin the coat; every customer knows at the time of giving the order that the manufacturer or tradesman may have other orders on hand; and I do not think that *Attwood* v. *Emery* (4) goes further than this, and it does not seem to me to be a decision against the plaintiffs. If, however, it is an authority in favour of

(1) 37 L. T. (N.S.) 789.
(2) 9 Ex. 341; 23 L. J. (Ex.) 179.
(3) 1 E. & E. 602; 28 L. J. (Q.B.) 178.
(4) 1 C. B. (N.S.) 110; 26 L. J. (C.P.) 73.

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the defendants, I cannot agree with it. In construing the contract in the present case, I think it would be utterly unreasonable to hold that the defendants were not bound to deliver the "gun" until the state of affairs in their workshop should allow them to do so: the defendants ought not to have undertaken to make it, unless they were certain that they could carry out their contract; it is not likely that the plaintiffs would have consented to wait, if they had known that the defendants had not then the necessary appliances to enable them to carry out the contract. It must be taken against the defendants that they entered upon a contract to do the work with such appliances as they might be reasonably expected to have, although I confess that even this limitation seems to me doubtful. The work has not been done within a reasonable time, and the plaintiffs are entitled to judgment. Whether they can recover all the damages claimed seems at first sight to admit of very considerable doubt. The fact that a binding agreement has been arrived at does not of itself create a responsibility for all the injury flowing from a breach of it: the wrong-doer is primâ facie only liable for the natural and ordinary consequences of the breach; but where at the time of entering into the contract both parties know and contemplate that if a breach of the contract is committed some injury will accrue, in addition to the natural and ordinary consequences of the breach, the person committing the breach will be liable to give compensation in damages upon the occurrence of that injury; and where the contractee states that he wants the article agreed to be made in order to help him to carry out another contract, the contractor if he commits a breach in the delivery of the article is liable for the loss sustained by the contractee if he becomes unable to carry out that other contract. It is said that a subsidiary contract is a contract made upon the basis of another contract: this language is neither very definite nor very accurate; but it has occurred to me that the true explanation is that a person contemplates the performance and not the breach of his contract; he does not enter into a kind of second contract to pay damages, but he is liable to make good those injuries which he is aware that his default may occasion to the contractee. I am not trying to invent a theory of my own, but to find out the effect

of former decisions. The plaintiffs are entitled to recover upon the footing that they were unable to fulfil their contract with Justice. They are entitled to recover compensation for their expenditure, and for the loss of their reasonable profit, and for the cost of the paint which was necessary for the preservation of the machine. It has been contended that the plaintiffs might have sold the machine to other persons, and that if they had done so the damages would have been considerably reduced, but it is to be borne in mind that this is not an ordinary machine; there is evidence that it is useless except as old iron, and the defendants were aware of the nature of the risk which they ran if they made default. I am of opinion that Field, J., was right both as to the question of construction and as to the principle upon which damages should be assessed. The judgment of Field, J., must stand.

BRETT, L.J. I am of opinion that Field, J., was right in his construction of the contract. I think that reasonably diligent tradesmen are able to form a fairly correct conclusion as to the accidents of their own business, when they are forming an estimate of the time within which work must be done. I do not think that *Attwood* v. *Emery* (1) decided anything which cannot be fully adopted. It was there held that the delay on the part of the plaintiffs was to be excused by reason of the size of their business, and by the circumstance that they had several orders on hand. I think that the direction to the jury in that case was correct, and that the verdict was properly found. But in the present case I think Field, J., was right in holding that the accidents of the defendants' business were not to be taken into account in their favour.

A question has been raised as to the measure of damages, and we must determine the principle upon which they are to be assessed. Here there are two contracts, the one between the plaintiffs and the defendants, the other between the plaintiffs and Justice: the former contract is made upon the basis of the latter. I do not think it necessary to say that the defendants have expressly contracted to pay the damages caused to the plaintiffs

(1) 1 C. B. (N.S.) 110; 26 L. J. (C.P.) 73.

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by the loss of their contract with Justice; an agreement to pay damages does not form part of the contract; but it was fully implied that the plaintiffs would hold the defendants responsible for any loss which they might sustain, if by the defendants' default the plaintiffs became unable to carry out their contract with Justice. It is now customary to speak of knowledge forming the basis of the contract; but here I do not think that we can say that the contract of the defendants was entered into upon the basis of their paying penalties if they did not fulfil it. The notice of the special circumstances must be given at the time of entering into the contract. I do not think that notice at a subsequent time would be sufficient; in the present case a good deal of conversation, correspondence, and negotiation passed between the parties, but I think that the facts are sufficient to satisfy the rule that notice must be given at the time of entering into the contract. It was proved that both the plaintiffs and the defendants knew that the machine was to be delivered at the end of August; the defendants were aware that it might be rejected, and that if it were it would be unsaleable, so that the work done by the plaintiffs would be thrown away. The loss to the plaintiffs flowing from the breach committed by the defendants would be the loss of the expenses incurred and of the profit upon the contract with Justice: from this would be deducted the price which the rejected machine might fetch; its value when rejected seems to be only that of old iron; but it is unnecessary to discuss this point, as it has been settled by the agreement of the parties, that it should be handed over to the defendants; it is therefore easy to arrive at the amount properly payable to the plaintiffs.

Upon both the construction of the contract and the measure of damages the judgment of Field, J., was right.

COTTON, L.J. In my opinion this appeal fails. As to the question of construction I adopt the view of Field, J. By the words, "as soon as possible," the defendants must be taken to have meant, that they would make the "gun" as quickly as it could be made in the largest establishment with the best appliances. I do not think that these words can be taken to mean that the defendants merely promised to make the "gun," as quickly as the

means at their disposal might allow, however rashly they might have entered into the contract; such a stipulation would be unusual. The surrounding circumstances must be looked at, and they plainly shew that the plaintiffs required the defendants to supply the "gun" as quickly as it could be supplied, if they were provided with all proper appliances. The defendants are liable for the loss sustained by the plaintiffs by the refusal of Justice to take the machinery.

I will proceed now to consider what is the measure of damages. Field, J., held that the plaintiffs were entitled to recover the amount of the profit on the contract which they had lost, and of the expenses which they had uselessly incurred, and the cost of the paint expended by them in preserving the machine. It would have been difficult to ascertain the quantum of damages, if the plaintiffs had ordered the "gun" without reference to special circumstances; in that case the plaintiffs would have been entitled to compensation for the loss of the use of the "gun" at least for a reasonable time; but this is a case of a contract entered into with special circumstances, and the defendants are liable for all the consequences of its breach. It cannot be said that damages are granted because it is part of the contract that they shall be paid; it is the law which imposes or implies the term that upon breach of a contract damages must be paid. We must follow out the rule that the plaintiffs are only to have the damages, which are the ordinary and natural consequences of the breach; but this rule is subject to the limitation, that where the breach has occasioned a special loss, which was actually in contemplation of the parties at the time of entering into the contract, that special loss happening subsequently to the breach must be taken into account. The plaintiffs had, as the defendants knew, entered into another contract with Justice for the delivery to him of certain machinery within a stipulated time; and the defendants are answerable to the plaintiffs for the loss which the latter have sustained by the refusal of Justice to carry out the contract; and if the defendants had not agreed to take it, the machine would have been left on the plaintiffs' hands. In *Elbinger Actien-Gesellschafft* v. *Armstrong* (1) it appears to have been considered that penalties due under a contract, to which the

(1) Law Rep. 9 Q. B. 473, at p. 479.

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contract sued on was subsidiary, could not as such be recovered; that was because penalties are not the natural consequence of a breach. Here, however, the defendants knew that Justice might refuse to take the machinery if it should be delivered by the plaintiffs too late; the defendants therefore are liable for the consequences of their default.

Judgment affirmed.

Solicitors for plaintiffs: *Woollacott & Leonard.*
Solicitors for defendants: *Cheston & Sons.*

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May 27.

[IN THE COURT OF APPEAL.]

WADDELL *v.* BLOCKEY.

Damages, Measure of—Sale induced by Fraud—Loss occasioned by Cause happening after Sale.

L. ordered the defendant to buy for him rupee paper: the defendant sold rupee paper of his own to L., whilst he fraudulently led L. to believe that it belonged to third persons. The value of rupee paper afterwards became considerably less, but L. held for many months what the defendant had sold to him, and ultimately re-sold it at a loss of 43,000*l.*:—

Held, that the measure of damages was not the amount of the loss ultimately sustained by L., but the difference between the price which he paid for the rupee paper and the price which he would have received, if he had resold it in the market forthwith after purchasing it.

ACTION to recover damages for a fraudulent misrepresentation.

The cause was tried before Huddleston, B., without a jury, and the following facts were proved:—In August, 1875, the defendant represented to Peter Lutscher that Indian 5½ per cent. rupee paper would probably be a profitable investment; and upon the faith of these representations Lutscher instructed the defendant to buy for him 100,000*l.* worth of rupee paper. The defendant suggested that as rupee paper paid 5½ per cent., Lutscher might borrow money at a lower rate of interest in order to pay for what he might buy. The defendant accordingly purported to buy for Lutscher 110,000*l.* worth of rupee paper, and forwarded to him contract notes in due form. Subsequently in the same month Lutscher authorized the defendant to buy rupee paper to the

extent of 200,000*l.* The defendant accordingly purported to buy for Lutscher rupee paper to that amount, and Lutscher accepted it. The purchases were completed by Lutscher in the belief, that they were bonâ fide made by the defendant on his behalf on the Stock Exchange. After the purchases rupee paper rapidly fell in value, and ultimately, in March, 1876, Lutscher sold what had been bought for him by the defendant at a loss of 43,000*l.* In April, 1876, Lutscher filed a petition for liquidation by arrangement, and the plaintiff was appointed trustee. In June, 1877, it was discovered that the representations of the defendant as to the rupee paper were untrue, and that the defendant had not bought rupee paper for Lutscher on the Stock Exchange, but had simply transferred to him certain rupee paper belonging to himself. The present action was then commenced by the plaintiff for the benefit of Lutscher's estate.

Huddleston, B., found as a fact that the defendant had been guilty of a fraudulent misrepresentation, in pretending that he had purchased the two amounts of rupee paper on Lutscher's account upon the Stock Exchange and was not transferring his own stock to Lutscher. His Lordship further found that Lutscher had paid for the rupee paper on the faith of the defendant's representation, and he held that the plaintiff was entitled to recover the difference between the price which Lutscher had actually paid, and the price at which he has actually sold it, and he ordered judgment to be entered for the plaintiff for 43,000*l.*

The defendant appealed against the judgment, and also applied for a new trial on the ground that the damages were excessive.

May 6. *R. E. Webster, Q.C.*, and *Warmington*, for the plaintiff. The damages are not excessive and were assessed upon a right principle. The insolvent was not bound to sell the rupee paper when the market began to fall: *Twycross* v. *Grant* (1); and the plaintiff may recover damages for the injury sustained by Lutscher, which was the direct and natural consequences of his acting on the faith of the defendant's representations: *Mullett* v. *Mason.* (2) When an agent is employed to buy, it is a fraud if he sells his own property to a principal, who is under the belief that he is dealing

(1) 2 C. P. D. 469. (2) Law Rep. 1 C. P. 559.

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with a third party: *Brookman* v. *Rothschild* (1); *Gillett* v. *Peppercorne* (2); *Kimber* v. *Barber* (3); and in the present case the defendant occupied a fiduciary position. Upon the discovery of the fraud, the person defrauded may annul the contract, and the damages awarded in this action truly represent the amount payable to the plaintiff if the contract were annulled.

Cohen, Q.C., and *C. H. Anderson*, for the defendant. The proper mode of measuring the damages is by ascertaining the difference between the price actually paid and the real value of the rupee paper: *Davidson* v. *Tulloch* (4); that decision is exactly in point for the present case, except as to the question of fiduciary position; and if a person holding a fiduciary relation commits a breach of duty, he ought not to incur a more extended liability than one who perpetrates a downright fraud.

Cur. adv. vult.

May 27. The following judgments were delivered:—

BRAMWELL, L.J. We all are agreed that this appeal must be allowed: the damages cannot remain at the amount at which they have been assessed. When a person has been defrauded in buying a chattel, and is in a condition to restore it, he is entitled upon discovering the fraud to receive back the price, provided he offers to return the chattel. It may be that if the plaintiff, who represents the insolvent buyer, could have tendered the rupee paper to the defendant, he might have recovered back the whole price. Reliance has been placed upon *Brookman* v. *Rothschild*. (1) I do not deem it necessary to consider the principle of that decision: I think it distinguishable from this case. I will merely say that the decision seems to me to have worked an injustice, and to have taken away money from those who were entitled to keep it. If there could have been a restitutio in integrum, possibly the plaintiff in this action might have recovered in full. The question, however, is reduced to this, what damages is the plaintiff entitled to? How much worse off is the estate which he represents owing to the bargain into which the insolvent entered? We may suppose

(1) 3 Sim. 153; on appeal, 5 Bli. (N.R.) 165.
(2) 3 Beav. 78.
(3) Law Rep. 8 Ch. 56.
(4) 3 Macq. 783, 790.

the insolvent to have been an intentional and willing buyer: in fact he bought the rupee paper, he accepted it, and used it, that is, sold it. Therefore the plaintiff cannot tender it to the defendant, and the question is one of damages. The right mode of dealing with the damages is to see, what it would have cost the insolvent to get out of the situation, that is, what is the price at which he could have sold the paper? Suppose that a horse has been sold with a fraudulent warranty, and suppose the horse is re-sold with knowledge of the defect which had been fraudulently concealed, the damages to be recovered would be the difference in the prices obtained at the two sales. Here the question is, what could the insolvent have obtained, if he had re-sold the rupee paper which he had been induced to purchase by the fraud of the defendant. It was for the insolvent to consider whether he would sell it or retain it. The retention of it was his own voluntary act. If he elected to remain owner after the rupee paper began to fall in price, his loss was not owing simply to his having purchased it, but to his having purchased it and retained it. When I say that his loss is to be estimated by the price which he might have obtained upon a re-sale, I mean that he is entitled to include the commissions which he would have to pay upon the sale and the re-sale; further, he would not have been bound to re-sell hastily and unadvisedly, but he ought to have time allowed to him to ascertain what his loss really was. Upon these principles the amount must be calculated at which the damages are to stand.

BAGGALLAY, L.J. I think that the damages have been assessed at too high a rate. It is difficult to lay down a general principle, for every case must to some extent depend upon its own circumstances. In this case the defendant, having more than 300,000*l.* in rupee paper, agreed to buy rupee paper for the insolvent, suggesting that the rupee paper would pay interest at 5½ per cent., and that the money to pay for it could be obtained at a lower rate. The insolvent had no idea when he ordered the defendant to buy for him, that the defendant would sell rupee paper belonging to himself. The paper was ultimately sold by Lutscher, who thereby incurred a loss of about 43,000*l.*, and he is represented by the plaintiff, who is his trustee in liquidation. There are several

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modes in which the damages might be assessed. First, they might be assessed upon the basis of the difference between the price which the insolvent paid for the rupee paper and the price for which he might have bought a similar amount in the market; but this would not entitle the plaintiff to damages unless Lutscher paid too high a price for it. Secondly, they might be assessed upon the basis of the loss which the insolvent actually sustained. This was the course adopted by Huddleston, B.; but I think this view cannot be sustained, for it seems plain that the loss to the plaintiff flowed not from the fraud of the defendant, but from the circumstance that the insolvent held the stock during a period of five months whilst the rupee paper continued to depreciate in value. A third view is that indicated by Bramwell, L.J., namely, that the plaintiff, as representing the insolvent's estate, is entitled to the difference between the price which Lutscher paid for it and the price at which Lutscher might have re-sold it. This view I am prepared to adopt, and I agree that the damages should be assessed upon this basis. I think, however, that in ascertaining this difference the price at which Lutscher might have re-sold must be taken to be the price at which he might have re-sold if he had sold upon the same day upon which he bought from the defendant. What occurred after that is not to be taken into account.

THESIGER, L.J. I agree in the conclusion that the damages have been assessed upon a wrong principle, are excessive, and must be reduced. The plaintiff complains that the insolvent has been induced by the fraudulent misrepresentation of the defendant to buy rupee paper belonging to the defendant, which he would not otherwise have bought; and the plaintiff asks to be recouped the loss sustained upon the re-sale of such rupee paper through its depreciation in the market consequent upon a fall in the value of silver. The mere statement of the plaintiff's case indicates the objection to which his demand is open. There is no natural or proximate connection between the wrong done and the damage suffered. In *Twycross* v. *Grant* (1) the thing purchased was worthless, owing to inherent defects existing at the time of

(1) 2 C. P. D. 469.

the purchase. The plaintiff became a shareholder in a company, which was a dying one, and the fact of his holding his shares until it was dead, was decided by this Court to be no reason for reducing the damages assessed by the jury below the full value paid for the shares. In the present case, on the contrary, the thing purchased had at the time of purchase no inherent defect. There was nothing in it which either necessarily or naturally, or even probably, would lead to any loss. It became deteriorated by reason solely of a cause which subsequently arose. Under such circumstances the general rule laid down by the Lord Chief Justice in the case cited (1) would be applicable: "If a man is induced by misrepresentation to buy an article, and while it is still in his possession it becomes destroyed or damaged, he can only recover the difference between the value as represented and the real value at the time he bought. He cannot add to it any further deterioration, which has arisen from some other supervening cause." It is said that in this case if the fraud had been discovered before the re-sale, the insolvent might have avoided the purchase and returned the rupee paper, claiming the full sum given for it; and it is argued that inasmuch as in that way practically the defendant would have been mulcted in the damage represented by the difference between the value of the thing at the time of its sale and the depreciated value at the period of its return, it ought to follow that even when a re-sale has taken place the plaintiff ought to be put in the same position as he would have been if it had not. I am, in the first place, not prepared to admit the premise upon which this reasoning rests, for it appears to me by no means plain that where the article, although existing in specie, has depreciated in value by reason of a cause supervening subsequently to the sale, the buyer upon discovering the fraud can avoid the sale to him. It may reasonably be argued that the depreciated article proposed to be returned is not the same as that purchased, the parties cannot be put in statu quo, and the condition therefore upon which an avoidance of a contract upon the ground of fraud depends cannot be performed. But assume this not to be so, still it does not follow that the buyer, who has by re-sale rendered the return of the article in specie

(1) 2 C. P. D. at p. 544.

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impossible, is entitled to have the seller and himself put practically in the same position as if it had been returned. *Davidson* v. *Tulloch* (1) appears to be authority for the proposition, that in such a case the proper mode of measuring the damages is to ascertain the difference between the purchase-money and what would have been a fair price to be paid for the article at the time of the purchase. But the present case is complicated by the circumstance of the defendant's fiduciary position in the matter of the purchase, and by the fact that the fraud did not touch the value of the article sold, but consisted of a fraudulent representation that it was sold by a third party and not by the defendant himself. It would seem, however, strange if under such circumstances a plaintiff who has got the article he bargained for, upon whom no fraud as regards its value has been practised, could, after the article has been depreciated and resold at a loss owing to a cause totally unconnected with the fraud, claim to recover all the loss which he has thereby sustained. I cannot see upon what principle such a claim could be based. *Brookman* v. *Rothschild* (2) was a case of a very special and peculiar character, and does not, in my opinion, govern the present. I think that the damages may fairly be ascertained in the manner proposed by Baggallay, L.J., for by that course being adopted, as I understand it, the plaintiff is saved the loss, if any, which really accrued to him by reason of the insolvent's buying the defendant's rupee paper instead of getting rupee paper in the market, and the defendant is precluded from reaping any profit he may have derived from his disposal of the rupee paper privately to the insolvent instead of throwing it, as regards such sale, as a whole upon the market.

Action referred to re-assess the damages.

Solicitor for plaintiff: *A. G. Ditton.*

Solicitors for defendant: *Flux & Co.*

(1) 3 Macq. 783, 798. (2) 3 Sim. 153; on appeal, 5 Bli. (N.R.) 165.

[IN THE COURT OF APPEAL.]

1878
Dec. 7.

THACKER *v.* HARDY.

Stock Exchange—Broker and Principal—Payment of "Differences"—Illegal Contract at Common Law—Gaming and Wagering Contract—8 & 9 Vict. c. 109, *s.* 18—"*Time-Bargains.*"

The plaintiff, a broker, was employed by the defendant to speculate for him upon the Stock Exchange: to the knowledge of the plaintiff the defendant did not intend to accept the stock bought for him, or to deliver the stock sold for him, but expected that the plaintiff would so arrange matters that nothing but differences should be payable by him; the plaintiff knew that unless he could arrange matters for the defendant as the latter expected, the defendant would be unable to meet the engagements which the plaintiff might enter into for him. The plaintiff accordingly entered into contracts on behalf of the defendant, upon which the plaintiff became personally liable; and he sued the defendant for indemnity against the liability incurred by him and for commission as broker:—

Held, that the plaintiff was entitled to recover; for the employment of the plaintiff by the defendant was not against public policy, and was not illegal at common law, and, further, was not in the nature of a gaming and wagering contract against the provisions of 8 & 9 Vict. c. 109, s. 18.

THE plaintiff was a stock-broker and a member of the London Stock Exchange, and sued the defendant for commission and for an indemnity in respect of certain contracts into which he had entered, pursuant to instruction from the defendant. By his defence the defendant relied upon the provisions of 8 & 9 Vict. c. 109, s. 18, and alleged that the plaintiff had become a defaulter upon the Stock Exchange, but not by reason of his employment by the defendant. The cause came on for trial before Lindley, J., without a jury, who ultimately gave judgment to the following effect:—

LINDLEY, J. This action is brought by a broker against his principal for indemnity against liabilities incurred by the broker, in buying and selling stocks and shares upon the Stock Exchange for the defendant by his authority. The main defence is that the claim is founded upon gaming and wagering transactions, in respect of which no action can be brought. In order to decide the point thus raised, it is necessary to consider first the real nature of the agreement between the plaintiff and the defendant,

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and, secondly, how the law stands with respect to gaming and wagering transactions in stocks and shares.

As regards the true nature of the agreement between the plaintiff and the defendant, the conclusions at which I have arrived are as follows:—First, that the defendant was a speculator, and the plaintiff knew him to be so; secondly, that the defendant employed the plaintiff to speculate for him on the Stock Exchange; thirdly, that the defendant knew, or must be taken to have known, that, in order to carry out the transactions, the plaintiff would have to enter into contracts to buy or sell, as the case might be, and in order to protect himself and the defendant, to enter into other contracts to sell or buy respectively; fourthly, that there was, in fact, no other way in which the plaintiff could speculate for the defendant as he desired; fifthly, that the plaintiff did buy and sell accordingly; sixthly, that the defendant never expected, nor intended, to accept actual delivery of what the plaintiff might buy for him, nor actually deliver what he might sell for him, and that the plaintiff knew that the defendant never expected or intended so to do; seventhly, that the defendant, nevertheless, knew that he incurred the risk of having to accept or deliver, as the case might be, but was content to run that risk, in the expectation and hope that the plaintiff would be able so to arrange matters as to render nothing but differences actually payable to or by him, as the case might be; eighthly, that unless the plaintiff could arrange matters as expected, the defendant would be unable to pay for what was bought for him or deliver what was sold for him, and that the plaintiff knew perfectly well that the defendant would be unable so to do.

I proceed next to examine the law applicable to transactions of this kind. The only statute in force and material to be noticed is 8 & 9 Vict. c. 109, s. 18, which, in effect, declares all contracts by way of gaming and wagering null and void, and renders actions for the recovery of money won on any wager unsustainable. This Act does not expressly mention or allude to Stock Exchange transactions; but it has been decided that agreements, between buyers and sellers of shares and stocks, to pay or receive the differences between their prices on one day and their prices on another day, are gaming and wagering transactions within the meaning of

the statute: *Grizewood* v. *Blane* (1), *Barry* v. *Croskey* (2), and *Cooper* v. *Neil* (3), all decide that. But the plaintiff did not agree to buy or sell from or to the defendant; and I have the authority of Brett, L.J., for saying that the statute only affects the contract, which makes the bet or wager. The agreement between the plaintiff and the defendant rendered it necessary that the plaintiff should himself, as principal, enter into real contracts of purchase and sale with jobbers, and the plaintiff accordingly did so, and in respect of these contracts he incurred obligations, for the non-performance of which actions could and can now be brought against him. It is against the liability so incurred that he seeks to be indemnified.

Upon general principles an agent is entitled to indemnity from his principal against liabilities incurred by the agent in executing the orders of his principal, unless those orders are illegal, or unless the liabilities are incurred in respect of some illegal conduct of the agent himself, or by reason of his default. What the plaintiff was employed to do was to buy and sell on the Stock Exchange, and this he did; and everything he did was perfectly legal, unless it was rendered illegal as between the defendant and himself by reason of the illegality of the object they had in view, or of the transactions in which they were engaged. Now, if gaming and wagering were illegal, I should be of opinion that the illegality of the transactions in which the plaintiff and the defendant were engaged would have tainted, as between themselves, whatever the plaintiff had done in furtherance of their illegal designs, and would have precluded him from claiming, in a court of law, any indemnity from the defendant in respect of the liabilities he had incurred: *Cannan* v. *Bryce* (4); *McKinnell* v. *Robinson* (5); *Lyne* v. *Siesfeld.* (6) But it has been held that although gaming and wagering contracts cannot be enforced, they are not illegal. *Fitch* v. *Jones* (7) is plain to that effect. Money paid in discharge of a bet is a good consideration for a bill of exchange: *Oulds* v. *Harrison* (8); and if money be so paid by a

(1) 11 C. B. 526.
(2) 2 J. & H. 1.
(3) W. N. 1 June, 1878, p 128
(4) 3 B. & Ald. 179.
(5) 3 M. & W. 434.
(6) 1 H. & N. 278.
(7) 5 E. & B. 238.
(8) 10 Ex. 572.

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plaintiff at the request of a defendant, it can be recovered by action against him: *Knight* v. *Camber* (1); *Jessopp* v. *Lutwyche* (2); *Rosewarne* v. *Billing* (3); and it has been held that a request to pay may be inferred from an authority to bet: *Oldham* v. *Ramsden*. (4) Having regard to these decisions, I cannot hold that the statute above referred to precludes the plaintiff from maintaining this action.

It was, however, suggested that, independently of that statute, the gambling here was of so pernicious a nature as to be illegal on grounds of public policy. That the defendant was a reckless speculator, and that the plaintiff knew it, I consider to be beyond all doubt; but it does not follow that what they did or aimed at was illegal. In one sense they were both gamblers; but care must be taken not to be misled by an epithet, and, in order to avoid ambiguity, I have already pointed out exactly what the real nature of their transactions was. Such gambling as this, however demoralising and reprehensible, does not appear to me to be illegal, and my reasons for this opinion are as follows:—

It required a statute (7 Geo. 2, c. 8), to prevent gambling in the public funds; and notwithstanding the strong condemnation in the preamble of such gambling, the Act itself was repealed in 1860 by 23 & 24 Vict. c. 28. Moreover, even when the Act was in force, gambling in shares and foreign stocks was held not to be illegal, either under the Act or at common law. Lord Tenterden, indeed, was of opinion that such gambling was illegal at common law. He said so in *Bryan* v. *Lewis* (5); but this opinion was declared erroneous in *Hibblewhite* v. *M'Morine*. (6) Under these circumstances I am unable to hold that the transactions engaged in by these parties were illegal, or that the purchases and sales made by the plaintiff were made in pursuance of or to attain an illegal object. This view is supported by the judgment of Brett, L.J., in *Cooper* v. *Neil* (7), and by the case of *Ashton* v. *Dakin*. (8)

In answer to the argument that a contract which is void and

(1) 15 C. B. 562.
(2) 10 Ex. 614.
(3) 15 C. B. (N.S.) 316.
(4) 44 L. J. (C. P.) 309.
(5) R. & M. 386.
(6) 5 M. & W. 462.
(7) W. N. 1 June, 1878.
(8) 7 W. R. 384.

unenforceable cannot be made the foundation of an implied promise to indemnify, it appears to me sufficient to say that an obligation to indemnify is created whenever one person employs another to do a lawful act which exposes him to liability, and that, in my view of the evidence, the defendant did authorize the plaintiff to incur liability by buying and selling as above described. I am unable to draw the inference which the jury drew in *Cooper* v. *Neil* (1), namely, that the plaintiff was instructed to make time bargains, and that he did in fact make such bargains. A real time bargain is, I suspect, a very rare occurrence. *Grizewood* v. *Blane* (2) affords an instance of one, and *Cooper* v. *Neil* (1), as understood by the jury, afforded another. But what are called time bargains are, in fact, the result of two distinct and perfectly legal bargains, namely, first, a bargain to buy or sell; and, secondly, a subsequent bargain that the first shall not be carried out; and it is only when the first bargain is entered into upon the understanding that it is not to be carried out, that a time bargain, in the sense of an unenforceable bargain, is entered into. Such bargains are very rare, and this is what I understand the witnesses to mean when they say that there are no such things as time bargains on the Stock Exchange. For the above reasons I hold that the plaintiff is entitled to indemnity, notwithstanding the gambling nature of the transactions between himself and the defendant.

The defendant was himself unable to meet his engagements, and was the principal cause of the plaintiff's becoming a defaulter. The inability of the defendant to continue his speculations gave the plaintiff the right to close all the defendant's accounts; that appears from a celebrated case in Chancery, *Lacey* v. *Hill*. (3) Whether they were closed by the plaintiff or by the Stock Exchange committee, is, I think, immaterial, it not being proved that the defendant was in any way prejudiced by what was done. Consequently I give judgment for the plaintiff for the full amount claimed with costs.

The defendant appealed.

(1) W. N. 1 June, 1878, 128
(2) 11 C. B. 526.
(3) Law Rep. 8 Ch. 441 and 18 Eq. 182.

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M. J. Muir Mackenzie, for the defendant. In this case it is necessary to consider the mode in which business is done upon the Stock Exchange. The facts, read in their true light, shew that the plaintiff and the defendant agreed to gamble together, to jointly enter upon a wagering transaction, and therefore the plaintiff cannot maintain this action. If the contract was that nothing but differences should be paid, it cannot be upheld in a court of justice, for a contract of that kind is by way of gaming and wagering, within the meaning of 8 & 9 Vict. c. 109, s. 18: *Grizewood* v. *Blane*. (1)

[BRAMWELL, L.J. In *Grizewood* v. *Blane* (1) the jury did not find the facts to be such as we understand them to be.]

The difficulty in the defendant's way consists in the adverse view which Lindley, J., took of the facts. The agreement was that the defendant should simply find the money to pay the differences, and that the plaintiff should use the machinery of the Stock Exchange for gambling purposes. It was intended that the dealings between the parties should result merely in the payment of differences. The contracts between the plaintiff and the jobbers may have been lawful; but the bargain between the plaintiff and the defendant was both illegal at common law, and void under 8 & 9 Vict. c. 109, s. 18.

Horne Payne, for the plaintiff, was not called upon to argue.

BRAMWELL, L.J. I entirely agree with Lindley, J., as to his view of the facts, and as to his reasoning on them. The question is not between the jobber in the house and the broker. The bargains made by the plaintiff upon behalf of the defendant were what they purported to be: they gave the jobber a right to call upon the broker or the principal to take the stock, and they gave the broker the right to call upon the jobber to deliver it. There was nothing in the transaction from which the jobber could tell whether the transaction was bona fide, that is, for the purposes of investment, or whether it was a mere speculation. In *Grizewood* v. *Blane* (2) it was held upon the evidence that the contract was in the nature of a wager; but in the case before us the bargain

(1) 11 C. B. 526. (2) 11 C. B. at p. 539.

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was real, and meant what it purported to be, although when the time should come for fulfilment another bargain might be substituted for the original one. It has been, however, contended on behalf of the defendant that although the jobber might be able to enforce the contract as against the defendant, yet the bargain between the plaintiff and the defendant was that, although the plaintiff was to enter into a contract upon the defendant's behalf, yet the latter was never to pay for the stock when the time for taking it arrived; but that the plaintiff was to make another bargain, and to arrange that the defendant should never be called upon either to receive what he had contracted to receive, or to pay for what he had contracted to pay for. I am not sure that this is the true result of the bargain between the plaintiff and the defendant, but assuredly this is not the case in an isolated transaction upon the Stock Exchange. If a principal orders a broker to sell for him 10,000*l.* consols for the next account, I think it clear that he could not afterwards, as matter of right, order him to re-buy them: the broker might object that he was not bound to do so. Whether an obligation is cast upon the broker to avoid the transaction when business has been previously done in that manner, may be doubtful. If the principal had said that in reality he could not take the stock, and that the broker must re-sell it, and if the broker had assented, or even if the broker had expressed dissent, but nevertheless had bought the stock, possibly the understanding might be held to be, and a Court might come to the conclusion, that the arrangement was in truth that the two transactions should be set off, the one against the other, and that the principal should only pay the differences. However, it must not be overlooked that the broker might lawfully object that he was not bound to re-sell, although he would try to do so if he could find a market for the stock. In order to enable me to come to the conclusion that in the present case that state of facts existed, I should require to have a more minute examination of the evidence than I have bestowed upon it; but I will assume that that was the nature of the bargain between the parties, and that by its terms the principal would be entitled to call on the broker to re-sell the stock, so that, instead of taking and paying for it, the principal would have to pay only the differences. In my opinion

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that bargain does not infringe the provisions of 8 & 9 Vict. c. 109, which was directed against gaming and wagering; for the principal might take the stock which has been bought for him, and hold it as an investment. I have no doubt that it continually happens that stock which is bought for a rise is really taken up and held when the market falls. But the broker might be unable to re-sell, if, for instance, he had been ordered to buy shares in an insolvent bank; so that the transaction really comes to this, that the principal is bound either to take or deliver the stock (as the case may be), but the broker is to endeavour to relieve the principal from liability by buying or selling again. There is no gaming or wagering in a transaction of that kind: the broker has no interest in the stock, and it does not matter to him whether the market rises or falls; but when a transaction comes within the statute against gaming and wagering, the result of it does affect both parties. In the case before us, the broker does not wager at all. I am of opinion, therefore, that if every fact were found in the defendant's favour, he could not succeed. As to *Grizewood* v. *Blane* (1), I need make only this remark: in that case the question was not between a broker and a principal, but between two principals, namely, the jobber and the speculator. It is therefore of no authority upon the facts before us.

In the course of his judgment Lindley, J., has shewn what he understands to be the meaning of time bargains. A time bargain is not necessarily invalid; there may be a good contract to sell next year's crop of the apple trees growing in a specified orchard, and what is this but a time bargain? But if the term "time bargain" is understood to mean an agreement to pay the difference between the price at the time when the bargain is made and the price at a subsequent time, that agreement is perhaps in the nature of a wager, but it is not a "time bargain" in the ordinary sense of the word.

For these reasons I think that this judgment must be affirmed. It may be a sad thing that there should be gambling upon the Stock Exchange, but that is not the point which we have to consider; and I am not sure that it is a disadvantage that there should be a market where speculation may go on, for it is owing

(1) 11 C. B. 526.

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to a market of that kind that we now have so many railways and other useful undertakings.

BRETT, L.J. I do not like the rules and the proceedings upon the Stock Exchange, but I think that Lindley, J., has taken a correct view of the transactions upon it. It is unnecessary to deal with imaginary cases, for the basis of my judgment is, that Lindley, J., has found the facts rightly. He has found that the plaintiff was employed by the defendant as broker to deal for him on the Stock Exchange, and has also properly found that the plaintiff had authority to deal according to the practice of the Stock Exchange, and that the defendant knew or must be taken to have known, what it was necessary for the plaintiff to do in order to carry out his instructions. In my view, the defendant gave the plaintiff authority to enter into contracts for him on the Stock Exchange with jobbers: these contracts were intended to be real contracts, which the jobbers might enforce against him. The plaintiff has fulfilled the mandate to him, and has entered into real contracts. Lindley, J., came to the conclusion that the plaintiff did not agree to buy from or sell to the defendant, but that he was only bound to buy and sell for him; but that agreement made it necessary that the plaintiff should, as principal, enter into real contracts for the purchase and sale of stock with the jobbers. The plaintiff carried out these instructions, and incurred obligations in respect of which actions might now be brought against him. The plaintiff sued the defendant for commission upon the sale of stock, and for indemnity against the liability which he has incurred through the defendant desiring to speculate. I think that the plaintiff is entitled to recover in respect of both claims. I am unable to draw the inference of fact which the jury drew in *Cooper* v. *Neil*. (1) The counsel for the defendant has not argued that Lindley, J., has laid down the law wrongly, if the facts found by him are correct; but he has endeavoured to make out that the findings are wrong. Reference has been made to *Cooper* v. *Neil* (1), which was argued at length in this Court. The jury had found that the plaintiff was instructed to buy and sell for the defendant according to the rules of the

(1) W. N. 1 June, 1878, p. 128.

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Stock Exchange, but so as to make time bargains, and not to enter into bonâ fide transactions, and that the plaintiff had obeyed these instructions. It is plain that the meaning of "time bargain" in that case was not simply a contract for the future delivery of stock by or to the defendant, as the case might be, but a bargain which would only render him liable to pay the difference in the price of the stock at a future time, according to the rise or fall of the market. The action was brought for commission, and also for indemnity against the liability which the plaintiff had incurred in respect of those contracts entered into by him on behalf of the defendant; but if the bargains had been such as I have mentioned, the jobbers could not have sued him, because they were contracts which would have been null and void under 8 & 9 Vict. c. 109, s. 18, and therefore the plaintiff would have required no indemnity. As we thought that the case must go down for a new trial, we endeavoured to express our own view, so as to be a guide to the learned judge presiding at the second trial, first, as to the meaning of the term "time bargains;" secondly, as to whether the plaintiff had in fact made time bargains; for if he had merely made bargains for the future delivery of stock, he would not have entered into a contract rendered null by the statute, and could have maintained an action for an indemnity against the claims by the jobbers. We were of opinion that if upon the second trial the facts were found to be such as those now before us, the plaintiff would be entitled to succeed. It was further suggested in *Cooper* v. *Neil* (1) that the agreement was, that although the plaintiff being broker to the defendant, but contracting in his own person as principal, should enter into real bargains, yet the defendant should be called upon only to pay the loss if the market should be unfavourable, and should receive only the profit if it proved favourable; and that no further liability should accrue to the principal, whatever might become of the broker upon the Stock Exchange; so that, as regarded the real principal, the defendant in the action, it should be a mere gambling transaction. I then considered that a transaction of that kind might fall within the provisions of 8 & 9 Vict. c. 109, s. 18, but I thought that there was no evidence of it. And with respect to the present action, I

(1) W. N. 1 June, 1878.

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say that there is no evidence that the bargain between the parties amounted to a transaction of that nature. I retract nothing from what I said in that case. In the present case Lindley, J., has well understood the view which we took in *Cooper* v. *Neil* (1); he has followed the lines which we laid down in that case; he has found the facts correctly, and has taken a true view of the procedure upon the Stock Exchange. In law also his decision is correct.

As to *Grizewood* v. *Blane* (2), I need only say that upon the findings the judgment may be right; but the jury probably misunderstood the nature of the evidence before them.

COTTON, L.J. In my opinion this appeal fails. In dealing with this case we ought to consider what principle ought to be applied, without reference to the consequences of our decision; but I may add that by holding the defendant liable in this case we may do a good deal towards checking irregular transactions upon the Stock Exchange. It is not contended that if the findings are right, the judgment is wrong, and I think that upon the findings the decision of Lindley, J., is clearly correct. I adhere to the opinion expressed by the members of the Court in *Cooper* v. *Neil* (1), and that opinion shews that the defence in the present action must fail. It was assumed by the counsel for the defendant that by the bargain between him and the plaintiff he was liable for only the difference, whatever should happen to the plaintiff; and it was contended that a contract of that kind would be null and void, as being against the provisions of 8 & 9 Vict. c. 109. I will assume that the plaintiff was in a certain sense acting as principal; nevertheless there was no gaming or wagering in the contract. The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way A. will lose, but if it turns out the other way he will win. But that is not the state of facts here. The plaintiff was to derive no gain from the transaction; his gain consisted in the commission which he was to receive, whatever might be the result of the transaction to the defendant. Therefore the whole element of

(1) W. N. 1 June, 1878. (2) 11 C. B. 526.

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gaming and wagering was absent from the contract entered into between the parties.

It appears to have been imagined on behalf of the defendant that *Grizewood* v. *Blane* (1) shewed that such a transaction as that before us is in the nature of gaming and wagering, and that no action can arise out of it. I cannot concur with that view. In that case, according to the findings of the jury, neither party intended that there should be an actual buyer and seller; it was simply a bargain that according to the price of stock on a future day the parties should respectively gain or lose. According to this finding there existed the essential element of wagering; each party was to gain or lose according to a subsequent event, and the transaction was a wagering contract. In form it was a contract for sale of stock, but it was really entered into in order to carry out a gambling transaction. I wish, however, to point out that some transactions in which the parties may gain or lose according to the happening of a future event are not within the provisions of 8 & 9 Vict. c. 109; for instance, the sale of next year's apple crop is a transaction in which at a future time the parties may be respectively gainers or losers, according to the happening of the event; but the essential element of a wagering contract is wanting. It has been contended that upon the facts proved the proper inference to be drawn is that a wagering contract has been entered into. I cannot assent to this contention. The contract was simply this: the defendant authorized the plaintiff as his agent to enter into contracts for the purchase of stock, of such an amount that the parties must have known that the defendant did not intend to take it up, but that he meant to arrange matters in another way. I do not think that this transaction is avoided by the statute against gaming and wagering. In *Grizewood* v. *Blane* (1) the Court of Common Pleas was of opinion that, upon the facts found, the transaction between the parties was in truth a wagering contract; but it is to be remarked the jury might have come to a different conclusion; and, judging by what I know as to the mode of doing business upon the Stock Exchange, I think that it is not easy to justify the verdict in *Grizewood* v. *Blane*. (1) But at all events it is very distinguishable from the present case. In

(1) 11 C. B. 526.

Grizewood v. *Blane* (1) the plaintiff, being a jobber, pretended to buy from, or sell to, the defendant; here the plaintiff bought and sold for the defendant.

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Judgment affirmed.

Solicitors for plaintiff: *Morley & Shirreff.*
Solicitor for defendant: *Bury Hutchinson.*

[IN THE COURT OF APPEAL.]

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MARTIN *v.* MACKONOCHIE.

Ecclesiastical Law—Court of Arches—Monition attached to definitive Sentence—Suspension ab officio et beneficio, for subsequent Offence, on Motion—Prohibition—53 Geo. 3, c. 127—Church Discipline Act—3 & 4 Vict. c. 86.

In a criminal suit against a clerk instituted in an Ecclesiastical Court, a monition to abstain in future from the commission of unlawful acts may be attached to a definitive sentence; and if the monition be disobeyed, the clerk, upon motion and without a fresh suit, may be condemned to suspension ab officio et beneficio; and such a proceeding is not in contravention of the Church Discipline Act (3 & 4 Vict. c. 86).

So *held*, overruling the decision of the majority of the Queen's Bench Division, by Lord Coleridge, C.J., James and Thesiger, L.JJ.; Brett and Cotton, L.JJ., dissenting.

APPEAL by the Dean of Arches and John Martin against an order of the Queen's Bench Division (2) directing that a writ of prohibition should issue, to prohibit the official principal of the Arches Court of Canterbury from publishing, proceeding with, or enforcing a decree or sentence of suspension ab officio et beneficio, made by the official principal on the 1st of June, 1878, against the Rev. A. H. Mackonochie, clerk, the incumbent and perpetual curate of the church and benefice of St. Alban's, Holborn, in the county of Middlesex and diocese of London.

In 1874 Sir R. Phillimore, then Dean of Arches, had decreed that the Rev. A. H. Mackonochie had offended against the ecclesiastical laws in certain matters of ritual, and had suspended him for six weeks, and had admonished him "to abstain for the future

(1) 11 C. B. 526. (2) 3 Q. B. D. 730.

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from the practices set forth" in such of the articles "as he pronounced to have been proved." (1)

On the 29th of March, 1878, a further monition was issued and served; but, as neither monition was obeyed, Lord Penzance, who had become Dean of Arches, after due notice, decided that Mr. Mackonochie had disobeyed and contravened the monitions of the Court, decreed him to be suspended ab officio et beneficio for three years, and condemned him in costs. It was in respect of this suspension that the writ of prohibition was ordered to issue.

March 10, 11, 12, 13. *Sir H. S. Giffard, S.G.* (*C. Bowen* and *George H. Blakesley*, with him), for the Dean of Arches. The suit against Mackonochie was commenced under the provisions of the Church Discipline Act by letters of request to the Dean of Arches, for matters exclusively of ecclesiastical jurisdiction, and all the proceedings were conducted with perfect regularity, according to the practice of the ecclesiastical law; and it is not in the power of the High Court to interfere with procedure. The three points for discussion are: 1. Whether the cause was regular. 2. Whether the proceedings in the Ecclesiastical Court can be prohibited. 3. Whether there is any analogy between proceedings in Ecclesiastical Courts and proceedings in Courts of common law. In Coote's Ecclesiastical Practice, p. 10, it is stated: "Along with the law the English Ecclesiastical Courts adopted the practice of the Roman consistory to which they have closely adhered up to the present day;" and also at p. 104: "Criminal suits, as instituted in the Ecclesiastical Courts, are proceedings to punish and restrain an offender by judicial admonition or an infliction of the censures of the Church; they purport to be brought pro salute animæ, and are directed to the reformation of his manners and excesses;" and in *Ex parte Rose* (2) Coleridge, J., says the sentence is not merely in pœnam, but for reformation. There is, therefore, no analogy between the procedure of the Ecclesiastical and Criminal Courts. Causes in the Ecclesiastical Courts are either summary or plenary: Conset's Practice, p. 22, Oughton tit. Citation; but it

(1) *Martin* v. *Mackonochie*, Law Rep. 4 A. & E. 279, 293.
(2) 21 L. J. (Q.B.) 341.

is not ground for prohibition that a punishment has been inflicted in a summary cause which ought to have been inflicted in a plenary cause. One object of these proceedings, according to the ecclesiastical law and practice, is to prevent a repetition of the acts declared to be offences by the judgment of the Court. It is a mistake to say that the judgment in the case put an end to the suit. The sentence is part of the judgment of the Court, and the suit continues in existence for the purpose of enforcing the sentence. In Coote's Practice, p. 255, a form of judgment is given suspending the offender ab ingressu ecclesiæ during a fortnight. It was common to append a monition to a definitive sentence, as shewn in the following cases: *Fendall* v. *Wilson* (1); *Field* v. *Cosens* (2); *Blackmore* v. *Brider* (3); *Burgess* v. *Burgess* (4); *Cox* v. *Goodday* (5); *Sanders* v. *Head* (6); *Burder* v. *Hale* (7); *Newbery* v. *Goodwin* (8); *Austen* v. *Dugger* (9); *Canning* v. *Sawkins* (10); *Orchard* v. *Cobb.* (11) A breach of that monition involved the delinquent clerk in ecclesiastical censures. These censures were, excommunication (which was also applied to laymen), sequestration, suspension, dispensation, and finally degradation: Oughton Ordo Judiciorum, tit. 137 in notes. To punish by excommunication it would be necessary to invoke the aid of the secular arm and proceed under the statutes passed for that purpose: 5 Eliz. c. 23; 53 Geo. 3, c. 127; 2 & 3 Wm. 4, c. 93; but the Ecclesiastical Courts have always exercised spiritual authority over contumacious clerks, and if a clerk, after a monition, continued contumacious, the Court, if it thought fit to pass so heavy a sentence, might suspend the offender ab officio et beneficio: Gibson's Codex, p. 1524. The offender was never discharged from the suit until its object was attained. The Court was not functus officio until the remedy had been rendered effective: *Barnes* v. *Shore* (12), *Maynard* v. *Brand* (13), *Winchester* v. *Rugg* (14),

(1) 2 Moore's P. C. (N.S.) 375.
(2) 3 Hagg. 178.
(3) 2 Phillim. 359.
(4) 1 Cons. 384.
(5) 2 Cons. 138.
(6) 3 Curt. 565.
(7) 6 Notes of Cas. 611.
(8) 1 Phillim. 282.
(9) 1 Addams, 307.
(10) 2 Phillim. 293.
(11) No. 98.
(12) 1 Rob. 382, 399. See also 15 L. J. (Q.B.) 296.
(13) 5 Phillim. 501.
(14) Law Rep. 2 A. & E. 247.

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Lincoln v. *Day* (1), *Jarratt* v. *Steele* (2), are authorities for this proposition. By the law and practice of the Ecclesiastical Courts, when a monition is appended to the sentence, it may be enforced by suspension without a fresh suit. This appears to be clear from *Harrison* v. *Dean and Chapter of Dublin* (3). It would seem from this case, as stated in Rothery's Return (4), that Harrison did not extract a license to preach in a parish church after being monished to do so: without any fresh suit he was pronounced to be contumacious, and sentenced to be suspended. The delegates dismissed an appeal which he brought from the sentence. *Higgins' Case* (5) is precisely similar. In *Chamberlayne* v. *Hewetson* (6) the monition was issued in an interlocutory suit, which was enforced by excommunication. No appeal was brought against this sentence, although there appears to have been an appeal against an order for the admission of certain evidence. *Rutter* v. *Wainwright* (7) illustrates the practice of the Ecclesiastical Courts, and shews that excommunication will lie for disobedience to a monition. *Boughton* v. *Dean and Chapter of York* (8) is an authority shewing that suspension is a proper penalty for contempt or contumacy. The cases of *Martin* v. *Mackonochie* (9) and *Hebbert* v. *Purchas* (10) are cases in point to shew that a clerk may be suspended ab officio et beneficio on a summary application for disobeying a monition. It would appear in the judgment of *Hebbert* v. *Purchas* (11) the words "a sentence of deprivation on a motion," ought to be read "a sentence of deprivation or amotion." Possibly it is this mistake which has led to the comments in the judgment of Cockburn, C.J., in the Court below. (12) These cases are binding on the Court of Arches, and are entitled to the consideration of this Court. Although there is no strict analogy between a monition in the Ecclesiastical Court and an injunction in the Court of Chancery, still there is some resemblance between the two processes. The party is summoned, the matter is heard

(1) 1 Rob. 724.
(2) 3 Phillim. 170.
(3) 2 Bro. P. C. 199.
(4) No. 135.
(5) No. 136.
(6) No. 100.
(7) No. 82.
(8) No. 134.
(9) Law Rep. 3 P. C. 409.
(10) Law Rep. 4 P. C. 301.
(11) Law Rep. 4 P. C. at p. 312, line 16.
(12) 3 Q. B. D. at p. 767.

upon affidavits, if a breach is proved the offender is committed, and he is punished in one case for a disobedience to the monition; in the other for a disobedience to the injunction.

As to the jurisdiction of the High Court over the Ecclesiastical Court, the High Court has no control unless the Ecclesiastical Court exceeds its jurisdiction. In *Couch* v. *Toll* (1) the Ecclesiastical Court has proceeded to sentence without citation, but it was held to be error in procedure, and not matter of prohibition. See also Ayliffe's Parergon, p. 438. In *Shatter* v. *Friend* (2) the prohibition was granted because the matter was temporal. The observation of Holt, C.J., in *Breedon* v. *Gill* (3) is the basis of all the cases, that if the matter is of spiritual cognizance, the Courts at common law will not interefere by prohibition. The mode in which a defendant is brought before the Court is procedure, and the question of the sufficiency of the notice of the procedings is also procedure: *Ex parte Smyth* (4); *Ex parte Story* (5); *Rex* v. *Payton.* (6) As pointed out by Le Blanc, J., in *Ackerley* v. *Parkinson* (7), a mistaken procedure is not excess of jurisdiction; if it were otherwise the judge would be liable to an action for a mistake in the practice of his court. In *In re Crawford* (8) it was decided that the Court of Queen's Bench would not interfere with the procedure of other courts. There is, therefore no analogy between the proceedings in the Ecclesiastical Courts, and the Courts of Criminal Law, which latter are intended to punish a man by temporal penalties inflicted upon him through his body, lands, or goods: *Caudrey's Case.* (9)

Lastly, ought Mr. Mackonochie to have been proceeded against under the Church Discipline Act? The original suit was instituted under that Act, and the decree of suspension was part of that suit. It was not therefore instituted against the provisions of the Act. The enforcement of the monition is part of the established practice of the Ecclesiastical Courts, and this practice is upheld and recognized by ss. 9, 11, and 12, of that statute. If

(1) March. 98.
(2) 1 Show. 158.
(3) 1 Ld. Raym. 221.
(4) 3 A. & E. 719; S. C. 2 C. M. & R. 748.
(5) 8 Ex. 195.
(6) 7 T. R. 153.
(7) 3 M. & S. at p. 427.
(8) 13 Q. B. 613.
(9) 5 Rep. 6a.

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the word "proceeding" in s. 23 were construed in the extended sense contended for, no sentence of the Ecclesiastical Court could be enforced without a fresh suit. This would render the process of the court nugatory, for a delinquent clerk could not be signified and imprisoned under 53 Geo. 3, c. 127, for contumacy, without a commission of inquiry or letters of request.

March 13, 14. *Stephens, Q.C.* (*Droop* and *Jeune*, with him), for the promoter, also argued that the order for a prohibition ought to be discharged, and relied upon the three following points:—1, that the Court of Arches can as part of its sentence admonish the defendant not to commit offences which by its judgment it has declared to be illegal; 2, that the Court on a motion and without a fresh suit can punish as contumacy a disobedience of such monition; 3, and that suspension ab officio et beneficio is a mode of punishment which can be lawfully inflicted upon a clerk for contumacy.

March 14, 17, 18, 19. *Charles, Q.C.*, and *Phillimore*, for Mackonochie. The precedents will prove that monition is an ecclesiastical censure, and that suspension and excommunication are also ecclesiastical censures, but they will fail to prove that a disobedience to a monition appended to a definitive sentence to a penal suit can be punished at all, or at least by suspension.

1. What is the nature of the offence for which Mr. Mackonochie has been punished? 2. What is the exact nature of the punishment inflicted? It is said that although this is a suit under the Church Discipline Act for the correction of a clerk, yet the analogies of criminal procedure have no application. But it must be remembered that Mr. Mackonochie has been punished for an indictable misdemeanour, for which he might have been tried before a judge of assize. All these offences are offences against the Act of Uniformity, 1 Eliz. c. 2. Sects. 3 and 4 of that Act provide that if any minister shall refuse to use the Book of Common Prayer, or shall use any rites or ceremonies other than those set forth in that book, or shall preach in derogation of that book, he shall be punished upon indictment for the first offence by loss of one year's profits of his benefice and six months' imprisonment, and for the second offence by imprisonment for one

year and deprivation of all spiritual promotion, and for the third offence by imprisonment for life. These penalties might be inflicted by a court of assize (s. 17). But the powers exercised by the Ecclesiastical Courts must be exercised upon principles similar to those observed in the temporal Courts. It is true that the jurisdiction over the offences mentioned in the statute is reserved to the Ecclesiastical Courts by s. 23, but nevertheless they must be treated as matters of a criminal nature, for a minister punished before one tribunal shall not afterwards be punished before the other tribunal for the same offence (s. 24). Mr. Mackonochie might be indicted in a temporal Court for the offences in respect of which he has been suspended for breach of the monition. Could he plead in bar of the indictment the fact that he has been suspended for three years by the Dean of Arches in respect of the same offence? In a court of assize a minister could only be punished for a second offence against the statute upon a fresh indictment, and therefore he can be proceeded against in the Ecclesiastical Court only on a fresh suit; but the Dean of Arches claims jurisdiction to punish offences committed by Mr. Mackonochie during the rest of his life without instituting a further suit, and merely upon the monition. The jurisdiction claimed by the Dean of Arches is prejudicial to an incriminated clerk in three ways. First, he is deprived of his right under s. 18 of the Church Discipline Act (3 & 4 Vict. c. 86) to have his witnesses examined viva voce. Secondly, a suit under the Church Discipline Act, s. 20, must be commenced within two years of the commission of the offence: *Ditcher* v. *Denison* (1); and although no letters of request could be issued to the Dean of Arches, yet the Dean of Arches in a summary manner can punish the offender for disobedience of the monition more than two years after the prohibited act has been committed. Thirdly, he may be punished during the whole of his clerical life for acts which a decision of a higher court subsequently to the institution of the original suit may declare not to be ecclesiastical offences. Some of the acts Mr. Mackonochie is charged with may not in the view of a higher tribunal be ecclesiastical offences: *Clifton* v. *Ridsdale*. (2) These

(1) 11 Moore's P. C. 324.

(2) 1 P. D. 316; on appeal, 1 P. D. 383; 2 P. D. 276.

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considerations shew that the alleged offences are of a criminal nature, and therefore the proceeding to punish them ought to be conducted upon principles analogous to those of the criminal law.

Then what is the nature of the punishment inflicted? According to the Dean of Arches, as stated in his judgment in *Combe* v. *Edwards* (1), Mr. Mackonochie has been suspended for three years because he has been guilty not only of contumacy, but also of grave ecclesiastical offences by repeated breaches of the law of the Established Church. The suspension being for a fixed period, it cannot be considered to be inflicted for contumacy; a sentence for contumacy ought to be quousque, that is until the clerk submits to the order of the Court. Suspension for contumacy may, from its nature, be relaxed upon submission, but no instance can be found in which suspension for a fixed period has been relaxed. If the acts of Mr. Mackonochie are parts of the old offence, he has been already punished for them by the six weeks' suspension in 1874; if it is a new ecclesiastical offence, then the Court of Arches has no jurisdiction, because the proceedings for the fresh offence have not been instituted by letters of request according to the Church Discipline Act, s. 23. The Court of Arches is the Court of the archbishop; by the Statute of Citations, 23 Hen. 8, c. 9, the archbishop had only jurisdiction in cases of appeal and a few other instances. By the Church Discipline Act the ecclesiastical procedure is somewhat changed, because the bishop of the diocese in which the offence is alleged to have been committed may issue a commission to inquire into it; nevertheless, under that statute the Court of Arches can only take cognizance of the charge when it has been transmitted to the Court by letters of request from the bishop in whose diocese the clerk holds preferment. The letters of request must contain a specific charge; the bishop cannot transmit charges which do not exist at the time when the letters of request are granted; neither was it intended that he should part completely with his power over his clerk. The clerk also is entitled to have proceedings instituted in the Court of his ordinary and to have the opinion of his bishop as to whether he has in a specific instance committed an ecclesiastical offence. If the contention on the other side is right, the letters

(1) 1 P. D. at p. 114.

of request will enable the Dean of Arches to deal with any subsequent offence committed by Mr. Mackonochie against ritual in any diocese within the province of Canterbury. But further even if suspension can be inflicted for contumacy, no precedent can be found in which a contumacious clerk has been suspended for a definite period; and suspension is wholly inapplicable as a punishment for contumacy; the only remedy for compelling a contumacious person to submit to the orders of the Court is by significavit and application to the secular arm under 53 Geo. 3, c. 127. No precedent can be found until modern times for suspending a clerk à beneficio or depriving him if he disobeys a monition; for suspension for a fixed period is temporary deprivation; the report of the Ecclesiastical Commissioners of 1832 contains no trace of any such practice.

The cases may be divided into three classes. 1. Cases where the monition alone is the sentence. 2. Where the monition was issued in the course of a suit before sentence. 3. Where the monition has been superadded to a definitive sentence. The cases falling within the first class are analogous to those in which the Court of Chancery issued an injunction. It is unnecessary to discuss this class, because disobedience to the monition is disobedience to the sentence of the Court, and therefore is a contempt of its jurisdiction; but the analogy does not apply where the monition is appended to a definitive sentence. When that sentence is pronounced the suit is ended. In like manner, before the 21 & 22 Vict. c. 27, damages could not be obtained by a party on an application for an injunction. All that the plaintiff was entitled to was an order restraining the commission of future breaches. A criminal suit, if the offence were trivial, might terminate in a mere monition. The cases belonging to the first class are *Barton* v. *Wells* (1); *Hodgson* v. *Dillon* (2); *Barnes* v. *Shore* (3); *Keith* v. *Trebeck* (4); *Winchester* v. *Rugg* (5); *Cox* v. *Goodday* (6); *Burgess* v. *Burgess* (7); *Woodbridge* v. *Holloway* (8); *Weston* v. *Hand* (9);

(1) 1 Cons. 21, 34.
(2) 2 Cur. 388.
(3) 1 Rob. 382.
(4) No. 162.
(5) Law Rep. 2 A. & E. 247.
(6) 2 Cons. 138.
(7) 1 Cons. 384.
(8) No. 61.
(9) No. 154.

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Wilson v. *McMath* (1); *Rutter* v. *Wainwright* (2); *Maynard* v. *Brand* (3); *Sumner* v. *Wix* (4); *Martin* v. *Mackonochie* (first suit) (5); *Jarratt* v. *Steele.* (6) The first four cases, though the proceedings were criminal in form, were suits for the trial of a civil right. They are open to different considerations from criminal suits in the strict sense of the words. In *Winchester* v. *Rugg* (7) an observation of Sir R. Phillimore that disobedience to the order of the Court would be attended with penal consequences does not support the contention for the appellants, for it does not appear what the penal consequences are. His opinion, expressed in his work on Ecclesiastical Law, vol ii. p. 1377, seems to be that if it were not for the decisions in *Hebbert* v. *Purchas* (8) and *Martin* v. *Mackonochie* (9) the power of the Ecclesiastical Court to punish for contumacy would be limited to signifying the offender. In *Cox* v. *Goodday* (10) the suit was for brawling in church, and a monition for such an offence is a perfectly legitimate sentence. *Burgess* v. *Burgess* (11) does not advance the argument on the other side, because the monition there is the sentence. And where the monition is the sentence, the suit is at an end except for the purposes of execution. This remark is applicable to and disposes of the whole of the cases of this class. The next class of cases are those in which monition has been pronounced in the course of the suit, and disobedience to it has been dealt with as contumacy. If the offender did not appear he was pronounced contumacious, and punished by suspending him ab ingressu ecclesiæ or by excommunication. The preamble to the Statute of Citations, 23 Hen. 8, c. 9, shews that these were the two modes of punishment inflicted for contumacy, and it is expressly so stated in the commentary of John of Athon upon the constitutions of Otho, Lynwood, pp. 63, 64. No text-books suggest that a clerk can be suspended from his benefice for non-appearance. Excommunication is treated of as the proper mode of punishing contempt in Conset, p. 35; Clarke's Praxis,

(1) 3 Phillim. 95.
(2) No. 82.
(3) 3 Phillim. 501.
(4) Law Rep. 3 A. & E. 58.
(5) Law Rep. 2 A. & E. 116.
(6) 3 Phillim. 170.
(7) Law Rep. 2 A. & E. 247.
(8) Law Rep. 4 P. C. 301.
(9) Law Rep. 3 P. C. 409.
(10) 2 Cons. 138.
(11) 1 Cons. 384.

p. 24; Cockburn's Clerk's Assistant, p. 12. Gibson's Codex, is to the same effect, tit. 46, cap. 4. The appendix to Godolphin was published after his death, and does not appear to the first edition of his work, and is considered of no authority. The cases on this head are to be found in Mr. Rothery's return: *Chamberlayne* v. *Hewetson* (1); *Jones* v. *Curtis* (2); *Hancock* v. *Bomer*. (3) In the first two cases the monition seems to have issued pendente lite, and it is impossible to gather from these two cases what was actually done in them. They are therefore of little weight. In *Hancock* v. *Bomer* (3) the clerk was suspended until he appeared to the decree of the Consistory Court, but it does not appear that this decree was confirmed either by the Court of Arches or by the Delegates. It is no authority to shew that suspension for a fixed period is the proper punishment for contumacy. *Chamberlayne* v. *Hewetson* (1) was a case of excommunication and not of suspension, and, moreover, the excommunication was pronounced for disobedience to an interim monition. In *Jones* v. *Curtis* (2) it is possible that the suspension for non-appearing may have been ab officio, but to attach an indefinite suspension to a definite sentence is shewn to be erroneous by a reference to *Jones* v. *Pusey*. (4) There is also another kind of monition which ought to be mentioned, that is, where the judge acting in indulgence instead of sentencing an offender warns him, as was done by Lord Stowell in *Proctor* v. *Stone*. (5) In *Morrison's Case*, cited from Gibson's Codex, p. 1524, there was no citation; the monition was the commencement of the suit. The case is wholly different from the present, where the monition is appended to a sentence which ends the suit. The third class of cases, viz., where the monition is superadded to a definitive sentence, comprehend the following decisions: *Field* v. *Cosens* (6); *Turmine* v. *Clarkson* (7); *Burder* v. *Langley* (8); *Fendall* v. *Wilson* (9); *Blackmore* v. *Brider* (10); *Blackiston* v. *Barnard* (11); *Sanders* v. *Head* (12); *Burder* v.

(1) No. 100.
(2) No. 119.
(3) No. 99.
(4) No. 118.
(5) 1 Cons. 424.
(6) 3 Hagg. 178.
(7) 2 Coote's Prac. 253.
(8) 1 Notes of Cas. 552.
(9) 2 Moore's P. C. (N.S.) 375.
(10) 2 Phillim. 359.
(11) No. 163.
(12) 3 Cur. 565.

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Hale (1); *Newbery* v. *Goodwin* (2); *Canning* v. *Sawkins* (3); *Orchard* v. *Cobb* (4); *Austen* v. *Dugger* (5); *Kemp* v. *Knightbridge.* (6) Not one case can be found in which the monition appended to a definitive sentence has been enforced by a subsequent penal proceeding. Here the Dean of Arches claims to enforce a monition by summary process, and reliance is placed upon *Harrison* v. *Archbishop of Dublin* (7) and *Bishop of Kildare* v. *Archbishop of Dublin.* (8) As to both these cases it is clear that in each of them a properly instituted suit had been begun and was actually pending, and this is the view taken of the latter case in the *Dean of York's Case.* (9) The cases of *Boughton* v. *Dean and Chapter of York* (10), *Higgins* v. *Archbishop of Dublin* (11), and *Harrison* v. *Archbishop of Dublin* (12), are all instances of appeals from the several archbishops exercising summary visitatorial authority, and cannot be relied upon as authorities. *Lincoln* v. *Day* (13) shews that a clerk cannot be punished for contumacy committed after the termination of the suit by suspension, but only by significavit and imprisonment. In *Clewer* v. *Pullen* (14) a second suit was instituted to punish the clerk for disobedience to a monition in the first suit, and a heavier sentence, that of deprivation, was then passed. *Jones* v. *Jones* (15) shews that with regard to a clerk suspension ab ingressu ecclesiæ and suspension ab officio are not the same, and there probably a fresh suit was instituted subsequent to the monition. Here the suspension ab officio et beneficio is temporary deprivation, and the clerk is deprived of the profits without any writ of sequestration issuing: *Morris* v. *Ogden.* (16) The sentence is improper, and the only mode of proceeding is under 53 Geo. 3, c. 127.

Where there is a conflict of opinion between the Judicial Committee of the Privy Council and the Common Law Courts upon a question of jurisdiction, the proper mode of raising the point is by

(1) 6 Notes of Cas. 610.
(2) 1 Phillim. 282.
(3) 2 Phillim. 293.
(4) No. 98.
(5) 1 Addams, 307.
(6) No. 80.
(7) 2 Bro. P. C. 199.
(8) 2 Bro. P. C. 179.
(9) 2 Q. B. at p. 37.
(10) No. 134.
(11) No. 136.
(12) No. 135.
(13) 1 Rob. 724.
(14) No. 79.
(15) No. 63.
(16) Law Rep. 4 C. P. 687.

prohibition: *Cargo ex Argos.* (1) Mere irregularity in procedure is, no doubt, not a ground for prohibition; there must be an excess of jurisdiction. It is pointed out in the opinion of Willes, J., in *Mayor of London* v. *Cox* (2), in commenting on the *Bishop of Winchester's Case* (3), that the Courts of Common Law have judicial knowledge of the practice of the Ecclesiastical Courts, and in *Ackerley* v. *Parkinson* (4), Lord Ellenborough considered that the action would not lie, because the Ecclesiastical Court had some jurisdiction over the subject-matter, but it follows from the reasoning in that case that if the Ecclesiastical Court had been without jurisdiction, those acting under its authority would have been held accountable in the temporal Courts. *Rex* v. *Payton* (5), *Ex parte Story* (6), *Ex parte Smyth* (7), were cases in which mere points of practice were involved. Wherever there is a clear excess of jurisdiction, or wherever the party has sustained a wrong by the proceedings in the Ecclesiastical Court, prohibition may be granted: *Veley* v. *Burder* (8); and *Free* v. *Burgoyne* (9), shews that the Ecclesiastical Court will be prohibited as to that part over which it has no jurisdiction. This matter is one of excess of jurisdiction. If suspension for three years is a sentence for a fresh ecclesiastical offence, it is plain it is in excess of jurisdiction, because no proceedings have been taken under the Church Discipline Act; but if it is a sentence for contumacy alone, then it is a sentence wholly unauthorized by law; just as if a Court having power to fine should imprison. It is not a case where the punishment has been unjustly inflicted, but where no power exists to punish by suspension, and where the proper mode of proceeding is to signify the offender. It is no error of procedure, but an excess of jurisdiction, for it is the infliction of a wholly unauthorized punishment, and the enforcement of a wholly unauthorized sentence.

March 19. *Sir H. S. Giffard, S.G.*, in reply. The 55 Geo. 3, c. 127, was passed to abolish excommunication in certain cases,

(1) Law Rep. 5 P. C. 134, 356.
(2) Law Rep. 2 H. L. 239, 277.
(3) 2 Rep. 43 a; Cro. Eliz. 511.
(4) 3 M. & S. 411, 424.
(5) 7 T. R. 153.
(6) 8 Ex. 195.
(7) 3 A. & E. 719.
(8) 12 A. & E. at p. 311.
(9) 5 B. & C. 400.

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and substitute a different procedure. It did not limit the powers of the Ecclesiastical Courts in any other respect. These powers and remedies all remain intact.

The law as to contumacy is treated of at length in Van Espen cap. 3, par. 1, De contumacia; from which it appears that censure is the appropriate punishment for an ecclesiastical offence when it is accompanied by contumacy, and suspension is an ecclesiastical censure. He treats in cap. 10, De suspensione, and in cap. 11, De absolutione a censuris.

Cur. adv. vult.

June 28. The following judgments were delivered.

22 L.D. 324

THESIGER, L.J. In this case a suit was instituted in the Court of Appeal of the province of Canterbury, against the respondent, a beneficed clerk holding preferment within the diocese of London, for offences against the ecclesiastical laws. It was instituted under letters of request from the Bishop of London, issued in accordance with the provisions of the Church Discipline Act (3 & 4 Vict. c. 86), and being so instituted, proceeded with all the formalities required by the law and practice of the court in a plenary cause, down to the time when Sir Robert Phillimore, the then judge of the court, pronounced that certain of the practices set forth in the articles had been proved and passed upon the respondent a sentence of six weeks' suspension from his clerical office and duties, accompanied by a monition which was duly served, and by which he was monished to abstain for the future from the condemned practices. The respondent disobeyed the monition, and after a considerable interval of time, during which the practices were repeated, the matter was again brought before the court of which Lord Penzance had become the judge in a summary way, by notice of motion and upon affidavits; and the respondent not appearing, a second monition, similar to the first, was issued and served. That monition also, was disobeyed, and upon the matter again coming before the Court in the same summary way as before, and the respondent still not appearing, Lord Penzance passed upon the respondent a sentence of three years' suspension, "ab officio et beneficio." The respondent thereupon applied to the Queen's Bench Division for a writ of prohibition to restrain any proceedings to enforce

the sentence; and upon argument, that Court made an order for the issue of such writ, against which order the present appeal is brought. The grounds upon which it was made were that the proceedings against the respondent were contrary to ecclesiastical law and practice, and incompetent to support Lord Penzance's sentence in these respects, viz., first, that the original monition could not properly be appended to the sentence of six weeks' suspension; secondly, that even if it could be so appended, disobedience to it could not be made the subject of ulterior proceedings in the suit; and, thirdly, that even if that were not so, the disobedience could not be punished by suspension ab officio et beneficio, or by any other process than that of the significavit, under the statute 53 Geo. 3, c. 127. I pass by, for the present, any consideration of the point whether, assuming that the proceedings were contrary to ecclesiastical law and practice in any or all of the above respects, a writ of prohibition could properly issue; and propose to discuss only whether the proceedings were open to the objections alleged against them. With reference to the first of the three grounds upon which the decision in the Court below proceeded, it is no longer in dispute that a monition such as was issued by Sir R. Phillimore, may by ecclesiastical law and practice either constitute the whole of the definitive sentence in a penal suit, or be appended to, and form part of, the definitive sentence. A considerable number of precedents of monitions of both these classes have been found in the official forms extracted from the registry of Lambeth and other places, as well as in the ecclesiastical reports, and many of them were issued in suits instituted in the Court of Arches under letters of request. This fact, of which the majority who decided the case in the Court below seem to have been unaware, constitutes, in my opinion, a not unimportant step towards the establishment of the next, and as it seems to me, the turning point in the case, viz., that these monitions which I will call final monitions in criminal suits, are enforceable; in other words, that disobedience to them is punishable without the formality of a fresh suit.

I cannot but think it improbable that they would have been employed at all unless they were intended to serve some more useful purpose than that of mere menace, still less that they would

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have been found in company with sentences of actual punishment, where the punishment itself would, one must suppose, constitute a sufficient intimation that a repetition of the offences punished would subject the offender to increased punishment upon a second conviction in a fresh suit. Passing from that consideration, it appears to me on general grounds most reasonable that these final monitions should be capable of enforcement. The acts or omissions which constitute ecclesiastical offences vary almost indefinitely, from what has no element of moral wrong about it, as for instance putting up a tablet in a church without a faculty, or omitting under a bonâ fide claim of right to take out a licence from a particular bishop to serve the cure of souls, to the grossest offences against morality, and the majority of criminal suits for ecclesiastical offences are brought not so much, if at all "in pœnam," but to compel offenders, by means of ecclesiastical censures or coercitiones, to do something which by the law of the Church it is their duty to do, or to abstain from doing something which by this law is illegal. If then the Ecclesiastical Court is functus officio when it has punished the past offence, whether of omission or commission, and has no power to enforce the performance of the omitted duty or to restrain the repetition of the illegal act, except by the cumbrous machinery of a fresh suit, its usefulness is at least seriously impaired. The present case is not an inapt illustration of what I have just said. The wearing of an alb, the singing of the Agnus, and the kissing of the Prayer Book, are acts for which no one would have wished, in the first instance, any serious punishment to be inflicted upon the respondent; but what the promoter of the suit would reasonably desire, and that which would be the object of his suit, would be the effectual putting a stop to practices contrary to law and offensive to those who wish to maintain the rites and doctrines of our Reformed Church.

But against the considerations drawn from the existence of these final monitions, and from the subject-matter of the suits in which they issue, the following arguments have been urged. First, it has been said that to hold that in a suit instituted under letters of request a monition to abstain for the future from the offences forming the subject of the suit can ground any further

proceedings, would be to run counter to both the Bill of Citations, (23 Hen. 8, c. 9), and the Church Discipline Act, the former, because it provided that no person should be cited out of the diocese or peculiar jurisdiction where he was dwelling at the time of the citation, except in certain specified cases, and the case supposed does not belong to them, there having been no fresh letters of request to the Court of Appeal of the province in respect of the offences committed after the definitive sentence—the latter, because by the 23rd section of the Church Discipline Act, it is provided as follows: "No criminal suit or proceeding against a clerk in holy orders of the United Church of England and Ireland for any offence against the laws ecclesiastical shall be instituted in any Ecclesiastical Court otherwise than is hereinbefore enacted or provided," and yet in the case supposed the clerk would be punished for acts in respect of which none of the proceedings enacted or provided by the Church Discipline Act were taken. With deference to those who accede to this argument I think that it involves a petitio principii. Take, for example, the present case itself. The respondent was originally cited to appear in the Court of Appeal of the province, in strict accordance with the provisions of the Bill of Citations; the formalities required by the Church Discipline Act, and those required by the law and practice of the Ecclesiastical Courts in a plenary cause, were complied with down to the decree of Sir Robert Phillimore. If, therefore, by ecclesiastical law and practice the monition which formed part of that decree was capable of being enforced in the suit, it cannot be said that the provisions of either the Bill of Citations or the Church Discipline Act have been violated, and whether it could be so enforced is the question now to be decided. That the Church Discipline Act, while protecting accused clerks from the summary proceedings which were competent in certain cases before the Act, preserved everything which appertained by ecclesiastical law and practice to a plenary cause or suit, is clear so far as the Court of Arches is concerned from s. 13 of the Act, which provides that a case may be sent to that court by letters of request, "to be there heard and determined according to the law and practice of such court," and as regards the bishop's court from s. 11, which provides that "upon the hearing of such cause

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the bishops shall determine the same and pronounce sentence thereupon according to the ecclesiastical law." The 12th section throws further light upon this subject by providing, as was necessary in the case of the newly constituted tribunal, but unnecessary in the case of the Court of Appeal of the province, that the sentence might be enforced by the like means as a sentence pronounced by an Ecclesiastical Court of competent jurisdiction. But it is said that the limitation, contained in the 20th section of two years after the commission of the offence for the commencement of every suit or proceeding against the offending clerk, would be practically violated if under the colour of contumacy for disobedience to a monition, the clerk can at any time be brought by summary proceeding before the Court in which the suit was originally instituted, and further, that the provision in the Act of Uniformity (1 Eliz. c. 2), under which punishment by the ordinary would be a bar to conviction by the justices and vice versâ, would also be practically violated. These contentions also appear to me to be fallacious. It might as well be said that an injunction to restrain a trespass to land with the power of the Courts to punish disobedience to such an injunction violates the Statute of Limitations relating to such trespasses, or as has been suggested by James, L.J., that the power of a Court to punish as contempt an assault upon one of its officers ought not to exist, because such punishment if inflicted would not be a bar to an indictment for the assault. In law the same act may constitute separate offences in respect of which the punishment for the one is not theoretically a bar to punishment for the other, and a limitation which may apply to the one may not be applicable to the other. Any hardship which might thence arise may without fear be left to be remedied by the action of the tribunals having jurisdiction in the particular matter.

The reference to analogies drawn from the procedure of the temporal Courts leads me to the consideration of the next objection urged on behalf of the respondent. It is said that it would be contrary to the analogy of criminal proceedings in the temporal Courts, and opposed to first principles of justice, that an offender against the ecclesiastical laws should after a conviction and punishment in respect of the specific offences charged

against him, which could only result from the regular and formal proceedings of a duly constituted suit, be thenceforward in respect of a repetition of these offences deprived of the safeguard of such proceedings, and be liable at any time to punishment upon summary process. I have already in part and by anticipation met this objection, by a consideration of the character of criminal suits in the Courts Christian in reference to their subject-matter; but it is capable of further answer by considering their character in regard to the offender. They are not suits instituted like criminal proceedings in the temporal Courts, simply for the punishment of the offender in respect of specific acts charged against him. They are brought, to use the technical language of ecclesiastical law, "pro salute animæ et reformatione morum." The censuræ or coercitiones in them are correctional and disciplinary. The sentences may have, and often do have, a double aspect; they may be, to use the words of Coleridge, J., in *Ex parte Rose* (1), "not merely in pœnam, but for reformation," and I could not possibly point and illustrate the view which I am presenting more strongly than by further reference to the case I have just quoted. There a beneficed clerk, after the report of a commission of inquiry under the Church Discipline Act, instituted upon rumour, that he had been guilty of adultery, submitted himself, pursuant to the 6th section of the Act, to the sentence of the bishop. The bishop thereupon passed upon the clerk a sentence of suspension for three years, accompanied by a direction that at the expiration of the three years he should procure a certificate signed by three beneficed clergymen, of his good behaviour and morals during his suspension, and that such certificate should be approved of by the bishop before the suspension should be taken off. By means of this sentence the bishop obviously might keep a hold over the clerk beyond the period of suspension, and accordingly the latter applied for a writ of prohibition, on the ground that the bishop's sentence was contrary to the common law of the land. But the rule was refused, and Lord Campbell, after referring to the fact of the sentence with the condition annexed to it being short of deprivation which might have been pronounced, said of the condition that it was "a most reasonable condition, annexed for the

(1) 21 L. J. (Q.B.) 341.

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benefit of the delinquent." And he added, "It is, therefore, a power which ought to belong to the bishop, and no authority has been cited to shew that it does not so belong according to the course of the common law." Could Lord Campbell's language be more fittingly applied than to the present case? Sir Robert Phillimore inflicted a light punishment where he might have inflicted a more severe one, but made the condition of that light punishment the non-repetition of the offences for which it was inflicted. He did, therefore, what it was said in *Ex parte Rose* (1) it was reasonable should be done, and although he did it through the exercise of a power of a somewhat different kind, the power is one of which, as I shall shew presently, it may be said, as was said in *Ex parte Rose* (1), that no authority has been cited to shew that it does not belong to the Ecclesiastical Court. Pausing, then, at this point of the case, and looking at the question apart from precedent and direct authority, it appears to me that a strong presumption arises in favour of the view that monitions, constituting the whole or part of the definitive sentence in a penal suit, are capable of being enforced by summary process in the suit. But further inquiry into the matter strongly confirms this view. The form of these monitions in the first place is to be observed as indicating that they are enforceable. That adopted by Sir Robert Phillimore and by Lord Penzance in the present case is the same as that given in Coote's Ecclesiastical Practice, p. 255. By it the offender is warned not to repeat his offences "under pain of the law and contempt thereof": Coote, p. 150–52. The same form also is used in citations and monitions in civil causes and in reference to matters of an interlocutory character, or in the nature of process, or to pay costs: Coote, p. 826, 828; and obedience to all such last-mentioned citations and monitions, it cannot be and has not been disputed, may be enforced by summary process. In the second place, the dicta of ecclesiastical judges upon the subject of monitions to abstain from offences, goes far to establish that disobedience to them may be punished as contumacy or contempt. Sir William Scott, in *Burgess* v. *Burgess* (2), a criminal suit for incestuous cohabitation, and in reference to a monition of this kind, which by the way he called an injunction, said, "If obedience

(1) 21 L. J. (Q.B.) 341.

(2) 1 Cons. 393.

be not given to this order, excommunication and other consequences will follow." In *Barnes* v. *Shore* (1), the case of a clergyman charged with reading services and preaching without a licence in an unconsecrated chapel, Sir Herbert Jenner Fust, after stating that the offence alleged against the clerk had been proved, and that he had thereby incurred ecclesiastical censure, and must be admonished to refrain from offending in like manner in future, added, "Should he be guilty of a repetition of this offence, it will be one not only against his diocesan, but against the authority of this Court." In the *Bishop of Winchester* v. *Rugg* (2), a case where a beneficed clerk was admonished to obey the direction of his ordinary to hold services at a particular church, Sir Robert Phillimore in granting the monition was careful to call the defendant's attention to the fact that a disobedience to it would be attended, to use his own words, "with the grave penal consequences which the law attaches to the offence of contumacy." And lastly, in *Weston* v. *Hand* (3), a suit promoted in a consistory Court for fornication and adultery, the offender was warned not to consort or cohabit with the person who was the subject of the charge against him, under pain of the greater excommunication.

As regards the execution of decrees generally, in *Austin* v. *Dugger* (4) Sir John Nicholl speaks of the Court not being functus officio until the execution of the decree; and indeed it is manifest that in order to the execution of a final decree of suspension or deprivation, or to pay costs, the Court making the decree must have a power inherent in it of enforcing its decree. Accordingly in the case of the *Bishop of Lincoln* v. *Day* (5), where a clerk had been for drunkenness suspended from office and benefice for three years, and further, until he should produce and lodge in the registry a certificate of good conduct during that period, and the clerk at the end of the three years resumed his clerical duties without exhibiting the required certificate, Sir Herbert Jenner Fust pronounced him in contempt, and signified the contempt under 53 Geo. 3, c. 127; and in *Austin* v. *Dugger* (4) the

(1) 1 Rob. Eccl. 382, 389.

(2) Law Rep. 2 A. & E. at p. 253.

(3) No. 154 of Mr. Rothery's "Return of Appeals in causes of doctrine or discipline made to the High Court of Delegates."

(4) 1 Addams, 307.

(5) 1 Rob. 724.

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monition to pay costs was enforced in a similar way. It is not easy to understand why where a decree is in the nature of an injunction to restrain the repetition of an offence, and such a decree may properly be made, it should be any the less enforceable than the decree suspending a man from serving the cure of souls or ordering him to pay his adversary's costs. I thought for a time that in this respect a distinction might possibly exist between final monitions in civil or only quasi-criminal suits and those issuing in purely criminal suits. But even assuming that the suit against Mr. Mackonochie was, which I think it was not, a purely criminal suit, I cannot find in ecclesiastical text-books or in ecclesiastical reports that the distinction referred to exists as a matter of strict law, although it might probably to some extent be borne in mind, in considering in what cases it would be desirable in the exercise of their judicial discretion to issue a monition. It is also obvious that the difficulty of drawing the line as a matter of strict law would be almost insuperable. Much stress has in another part of the argument been laid by the respondent's counsel upon the Report of the Ecclesiastical Commissioners in 1832, but I do not find in it any trace of the distinction in question, and inasmuch as the Lord Chief Justice in the Court below has for one purpose quoted Sir Robert Phillimore's work on Ecclesiastical Law, I would observe that that learned judge, than whom no living person could be better versed in the practice of the Ecclesiastical Courts, treats as a matter really not in controversy at all, the proposition that these final monitions or admonitions in penal suits can be enforced. He says (vol. ii. p. 1088), "Disobedience to this admonition assumes the graye character of contempt or contumacy, and is visited by a graver punishment." And again (vol. ii. p. 1367), "It is to be observed that when an admonition has been duly served, after a trial, upon the admonished person, disobedience to it entails the penalties incident to the contempt of the order of a lawful court."

So far then as the form of these monitions, and the language of Ecclesiastical judges in relation to them goes, the à priori presumption that they are capable of being enforced receives considerable support, and it is strongly corroborated by early text-writers, to some of whom I shall have to refer later upon another

branch of the case which involves this point, and to whose authority more particular reference will be made by Lord Coleridge, C.J., in his judgment. But there is further confirmation of the presumption in what has been actually done by the Ecclesiastical Courts.

It is true that the recorded instances of the enforcement in a penal suit of monitions of the kind which I am discussing are rare; and those persons therefore who maintain that they are not enforceable at all are entitled to the benefit of that fact. But the argument derived from it cannot be pressed very far. The spectacle of clergymen setting at defiance the authority of the ordinary and the orders of the Ecclesiastical Courts is one which at least until recent times, has happily been of infrequent occurrence, and even if one could suppose that disobedience to monitions against the repetition of offences had been not uncommon, still upon the assumption that the punishment of such disobedience as contumacy or contempt was warranted by ecclesiastical practice, there is no reason why reporters should have taken special notice of the exercise by the Ecclesiastical Courts of its ordinary jurisdiction. Turning then to such instances as can be found, I take first Mr. Rothery's Return. In *Woodbridge* v. *Holloway* (1) a parishioner was charged by churchwardens, at the archdeacon's visitation, for not having received the Holy Communion at Easter. He appeared in the Archdeacon's Court voluntarily, and submitted himself to the judgment of the Court, which ordered him to communicate at the next administration, and to notify on the following Court day that he had done so. Having failed to obey the order of the Court, he was declared contumacious and decreed to be excommunicated. In *Rutter* v. *Wainwright* (2) a schoolmaster was cited before the Consistory of Chester for contempt of the law and ecclesiastical jurisdiction in teaching boys without having obtained any faculty or licence. Having confessed the charge, he was monished to obtain a licence by a certain day, but not then producing one was warned, under pain of excommunication, to desist from exercising the office of schoolmaster within the city of Chester without having first obtained a licence. On a subsequent day he was asked by the judge whether he relinquished the office of schoolmaster, and, not

(1) No. 61. (2) No. 82.

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replying, was sentenced "pro confesso haberi" and to be excommunicated. It may be said, however, that in these two cases the process was entirely of a summary character, arising out of visitatorial jurisdiction of the archdeacon and bishop respectively. Assume this to be so, still the cases indicate at least the correctional and coercive character of ecclesiastical jurisdiction, and in *Chamberlayne* v. *Hewetson* (1), a suit for adultery promoted in the Court of Arches by letters of request, disobedience to a monition forbidding the guilty parties to consort together except in public, was punished by excommunication. Leaving Mr. Rothery's Return, I find among the official forms extracted from the registry of the Arches Court of Canterbury a case of *Keith* v. *Trebeck* (2), which was a suit promoted in the Consistory Court of London, in the year 1741, against a clerk for performing divine service in St. George's, Hanover Square, without the licence of the bishop. The clerk, by an interlocutory decree bearing the force of a definitive sentence, was pronounced to have done what he was charged with doing, and was admonished not to do so for the future. He disobeyed the monition, and for his contempt was excommunicated; and, as appears from a report of proceedings in the same case before Lord Hardwicke (2), the excommunication was followed by its ordinary consequences. Lastly, I come to the recent cases in the Privy Council of *Martin* v. *Mackonochie* (3) and *Hebbert* v. *Purchas* (4), in which upon four separate occasions the suits, each of which had been in a sense, as here, terminated by a definitive sentence containing a monition to abstain for the future from the condemned practices, were held so far alive as to give jurisdiction to treat or to punish as contempt disobedience to the monitions. In *Martin* v. *Mackonochie* (3) a monition had been issued by Order in Council on appeal from the Court of Arches, and in 1869 a summary application was made to the Judicial Committee for an order to enforce compliance with such monition. The Committee, consisting of Lord Hatherley, L.C., the Archbishop of York, Lord Chelmsford, Sir James Colville, and Sir Joseph Napier, pronounced that the monition had been disobeyed with reference to a particular practice, and monished the respondent to abstain from that practice

(1) No. 100.
(2) 2 Atkyns, 498.
(3) Law Rep. 3 P. C. 52, 409.
(4) Law Rep. 4 P. C. 301.

in future, ordering him to pay the costs of the motion. This, therefore, is a precedent for the issue by Lord Penzance of the second monition. In 1870 a further motion to enforce obedience to the original monition was made, when the Committee, consisting of Lord Hatherley, L.C, the Archbishop of York, and Lord Chelmsford, referring to the proceedings which led to the second monition and to Mr. Mackonochie's subsequent repetition of his offence, ordered him to be suspended "ab officio" for three months. In *Hebbert* v. *Purchas* (1) two monitions had been issued by Orders in Council, the one commanding Mr. Purchas to abstain from certain illegal practices, the other to pay the taxed costs of the suit. He disobeyed both monitions; and, in February, 1872, as appears at p. 306 of the Report, the Committee of the Privy Council, consisting of Lord Hatherley, L.C., the Archbishop of York, the Bishop of London, Sir James Colville, Lord Justice Mellish, Sir Montague Smith, and Sir Robert Collier, on motion made to them, suspended Mr. Purchas for a year from his office, and directed a sequestration for the amount due from him for costs. Mr. Purchas continued to disregard the monitions; and in July, 1872, a second motion to enforce obedience to them was made, and deprivation was asked for by Dr. Tristram, on the ground that the Committee had the same powers of enforcing their orders and decrees as belonged to the Court of Delegates, and could make an order of deprivation. The Committee, consisting of Lord Hatherley, L.C., the Archbishop of York, Lord Chelmsford, the Bishop of London, Sir James Colville, and Sir Montague Smith, expressed a desire to receive further information upon the single point, as to the exercise of the power on the part of the Court of Delegates or the Privy Council to deprive a clerk on a summary application against him for contempt. On a later day it was stated by counsel that they were unable to find a case in which the Court of Delegates decreed a sentence of deprivation for a contempt of its decrees or sentences, but stated that there was abundant authority for such a sentence of suspension. The Lord Chancellor, in giving judgment, the report of which, at the twelfth line, should, I think, clearly be corrected by reading for the two words, "a motion," the one word "amotion," the

(1) Law Rep. 4 P. C. 301.

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synonym of deprivation, in substance stated that their Lordships could not proceed to enforce compliance with their monition by deprivation upon summary process for contempt; but he added, "on the other hand, their Lordships are quite satisfied that there exists in this tribunal, as there did exist in the High Court of Delegates—all the powers of which have been transferred to this Committee—a power of suspension not only ab officio, but à beneficio also, as a summary punishment for contumacy;" and a sentence of one year's suspension ab officio et beneficio was therefore inflicted. I shall have to touch upon these cases of *Martin* v. *Mackonochie* (1) and *Hebbert* v. *Purchas* (2) once again, when I come to the question whether the monitions in this case could be enforced by suspension, and I may admit at once, that, owing to the defendants in neither case appearing and arguing any point of law or practice, something must be taken off the weight which properly attaches to decisions of such a tribunal as the Privy Council; but if there were nothing but these decisions to support the view, that monitions to abstain from the repetition of offences are enforceable, there being no authority supporting the contrary view, I should doubt very much whether, looking to the constitution of the Committee upon the four occasions when the point was mooted, I should be justified in holding that what the Privy Council did upon those four occasions was a violation of ecclesiastical law and practice.

I express no opinion whether or not the proceedings of the Privy Council could, under any circumstances, be the subject of a writ of prohibition, for the counsel on both sides have abstained from arguing that question; and I do not affirm that the decisions of the Privy Council are in strictness binding on the Courts of Westminster Hall. But, on the other hand, no one will dispute that they demand the highest respect, whatever be the particular matter to which they relate, and when the matter is a moot point of ecclesiastical law and practice, in respect to which the Privy Council is the supreme court of appeal, and, as such, must be supposed to be the most competent to decide such a point, respect should at all events, except in some very extreme case which is not likely to occur, reach, in my opinion, as far as submission.

(1) Law Rep. 3 P. C. 52, 409. (2) Law Rep. 4 P. C. 301.

In this case, however, the decisions of the Privy Council only confirm the conclusion at which I should arrive without them, viz., that the monition of Sir Robert Phillimore was capable of being enforced by summary process, and if so, it could hardly be with any reason contended that Lord Penzance, by giving the respondent a locus penitentiæ in the shape of a second monition before inflicting punishment upon him for his contumacy, rendered his subsequent decree bad.

The question remains whether the two monitions could, according to ecclesiastical law and practice, be enforced by suspension of any kind, and if so, whether, by suspension à beneficio as well as "ab officio;" or whether they could only be enforced in the manner pointed out by 53 Geo. 3, c. 127. I cannot help thinking that, at the root of the objection to their being enforced by suspension, lurks a mistaken supposition that the punishment of suspension is one of a higher and graver character than excommunication, which was, until the statute 53 Geo. 3, c. 127, admittedly a punishment capable of being inflicted for disobedience to such monitions as were enforceable. So far from this supposition being correct, it appears to me that, as in the case of the laic, suspension, "ab ingressu ecclesiæ," so in the case of the cleric, suspension even from office and benefice was, in the eyes of Ecclesiastical Courts a milder form of punishment than excommunication; and as regards suspension "ab officio," it is clear that excommunication would include that and much more. If this be so, there is at least a presumption that if final monitions not to repeat offences are enforceable at all, they may be enforced by suspension "ab officio" at least; and inasmuch as the power of the Ecclesiastical Courts to interfere with a man's freehold by suspension from, or deprivation of, his benefice really flowed as the Lord Chief Justice, at p. 751, points out in the Court below, from the power to suspend or deprive him "ab officio," we are advanced a step in the argument that these monitions may be enforced by suspension "a beneficio" as well as "ab officio." There is really à priori no reason why the Ecclesiastical Court should not have power to punish disobedience to its orders by suspension just as much as by excommunication, or the modern statutory substitute for excommunication. Suspension and excommunication

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are appropriate censures for ecclesiastical offences. Contumacy is an ecclesiastical offence, and there is nothing in the nature of contumacy by disobedience to a final monition which renders the latter censure more appropriate to it than the former.

Indeed, at the present day, it seems to me that in most cases of contumacious clergymen, suspension is a far more desirable punishment than the significavit and imprisonment under the 53 Geo. 3, c. 127. The spectacle of a clergyman imprisoned for persistence in illegal ritualistic practices may shock the public conscience, and raise sympathy for a man who really deserves none, while the spectacle of a man suspended after due warning from an office the laws attaching to which he disregards, or from a benefice obtained under conditions which he will not fulfil, is one which must commend itself to every reasonable man. I may again therefore apply the language of Lord Campbell, C.J., in *Ex parte Rose* (1), and say that the power to suspend as well as signify for contumacy being a most reasonable power, is one which ought to belong to the Ecclesiastical Court; and before interfering with its exercise the temporal Courts should at least require some authority to be produced shewing that it does not so belong. No authority whatever to that effect has been produced, and, on the other hand, there is authority to support it. In prosecuting any inquiry upon this point, involving as it does the hypothesis that disobedience to final monitions is punishable upon summary process in some way, it must be remembered that whatever tends to shew that suspension is an appropriate punishment for disobedience to interlocutory monitions, tends with equal, if not greater, force to shew that it is appropriate to the punishment of the graver offence of disobedience to final monitions. Bearing this observation in mind, I proceed to refer to some passages of the early text-writers upon ecclesiastical law, which have been referred to in the argument. In the outset I would say that I do not attribute very much weight as bearing upon the question to the passage in Oughton's Ordo Judiciorum, tit. 137; Modus procedendi, p. 213, in which he says: "Suspensio dicitur quæ (post monitionem debite factam) ecclesiasticam personam ab officio seu beneficio vel ab utroque ad tempus excludit," for he there appears

(1) 21 L. J. (Q.B.) 341.

to me to be speaking not of a final monition and a suspension upon summary process for its disobedience, but of the monition which, in another passage under the same title, he describes as "præparatoria plerumque præcedens ecclesiasticas censuras," and which Ayliffe, in his Parergon, p. 260, calls the "canonical monition," and of a suspension which constitutes the definitive sentence in a penal suit. He is not, in other words, speaking of punishment for contumacy, but of ecclesiastical censures for offences against the ecclesiastical laws, in respect of which, at least where the offences were prosecuted in a summary manner by the bishop in his visitatorial capacity or ex mero officio, the early canonists appear to have considered that the offender should have an opportunity of ceasing to offend before the particular ecclesiastical censures could be inflicted upon him. But at the same time the fact, that a monition to abstain from the repetition of an offence may lead to suspension in a summary cause before a bishop acting in his visitatorial capacity, renders it not unlikely that a monition of the same kind, when issued as the definitive sentence or part of the definitive sentence, in a regular suit, whether promoted in the Bishop's Court or under letters of request in the Court of Arches, would be enforceable by the medium of the same punishment. Some weight, therefore, is to be attributed to the passage I have referred to, and it is further to be observed that Oughton, dealing with the offence of contumacy itself, tit. 38, p. 68, note (a), in a note to the words "Accusatâ contumaciâ," writes "pœna contumaciæ est excommuniciatio vel suspensio."

It has been suggested that the term "suspensio" in this and similar passages of Oughton and other text-writers, when mentioned without addition, means the lowest form of suspension, viz., "suspensio ab ingressu ecclesiæ," but there is really no foundation for this sweeping assertion, and in regard to this very passage of Oughton there is in it a reference for further explanation about these specified punishments to tit. 137 of the same work, where suspension includes suspension from benefice. The authority of Oughton is confirmed by that of the appendix to Godolphin's Repertorium Canonicum (2nd ed.), London, 1680, pp. 15, 16, par. 43, which speaks of the censures of the Church as being introduced "to defend the ecclesiastical power, and control

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obstinate sinners and contumacious offenders," and as consisting, according to Lyndwood, of "suspensio," "excommunicatio," and "interdictum." Suspension, he says, is the proper punishment of an offending clergyman. "It is either ab officio vel beneficio; the first is the punishment for not appearing upon lawful summons, the second for higher crimes." And, again, "This censure," i.e., suspension, "is inflicted . . . . by the decree of the judge or the laws, and then for a greater or a smaller crime; if for a smaller fault, then it is only ab officio." And the passage goes on further to say that in the event of a clerk suspended ab officio continuing without submission, or seeking to be restored, he might be suspended "a beneficio" also, and that by the canons of King James, if his contumacy continued, he was to be excommunicated, and after forty days was deprivable for incorrigibility. In subsequent paragraphs (46 and 49) suspension for ecclesiastical offences is spoken of in terms which distinguish such offences from contumacy in disobeying the orders of the Court, and which when read in conjunction with the previous passages I have quoted, indicate that suspension is an appropriate punishment for both.

Those passages are most important, for whether or not it be the case, as has been urged as an objection to their authority, that Godolphin did not write the appendix to his work himself, the fact remains that in a text-book the whole of which, including the appendix, has been for nearly two hundred years a received authority upon ecclesiastical law and practice, we find, first, suspension "ab officio" recognized as a punishment suitable to the offence of not appearing upon lawful summons; secondly, suspension "a beneficio" recognized as a suitable punishment for offences of a more serious character, and which would apparently include graver instances of disobedience to orders of an ecclesiastical superior or court than non-appearance upon lawful summons, and if so would probably include disobedience to such a monition as was issued in this case; thirdly, the hold of the ecclesiastical superior or court over a contumacious clerk recognized in the procession of punishment from the lighter suspension to the graver, and from that to excommunication, which is put as the highest punishment of all, and yet which it is argued,

against all probability, was the punishment which in all cases of contumacy the Ecclesiastical Court was, by its law and practice, bound at once to inflict. That excommunication was a punishment in use for contumacy is shown in another paragraph of Godolphin's appendix (par. 49), where it is said: "The next censure of the Church is excommunication, which is inflicted either ab homine vel jure; when it is inflicted ab homine it is usually for contumacy in not appearing before the ecclesiastical judge after a legal summons, or else for disobeying the orders, decrees, or sentences of the Court, and the slighting of his authority;" and it is possible that, being a punishment common to lay as well as spiritual persons, it may have been the more ordinary one in use; but that is very different from its being exclusively in use, and unless the authority of the appendix is to go for nothing, it is clear that suspension and excommunication might be applied as separate and distinct punishments for the same offences, including contumacy, and that if employed progressively suspension would, as the lighter punishment, be the first to be employed. Deprivation and degradation as punishments for ever altering the status of an offending clergyman stood upon a different footing. This view is borne out by other text-writers, to whom reference will be made by Lord Coleridge, C.J.; and turning from text-writers to reported cases, however few there may be, bearing upon the question, it is nevertheless the fact that so far as they go they are to the same effect.

First I find in Mr. Rothery's Return instances of monitions by which in express terms an Ecclesiastical Court has ordered something to be done by a defendant clerk under pain of suspension. *Jones* v. *Curtis* (1) was a suit promoted in the Court of the archdeacon of Berks by inhabitants of the chapelry of Garford, for the purpose of compelling the vicar of Marcham to perform or provide divine service in the chapel of Garford. The Archdeacon's Court made a decree in accordance with the prayer of the promoters; the Consistory Court reversed that decree by one which was in its turn reversed by the Court of Arches, and on appeal to the Delegates they pronounced sentence against the appeal with costs, and remitted the cause, whereupon the report states, "The costs

(1) No. 119.

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were taxed at 15*l.*, which Jones was ordered to pay within three months on pain of suspension." *Clewer* v. *Pullen* (1) was a suit promoted in the Court of Arches by a parishioner of Croydon, which was in the peculiar jurisdiction of the Cathedral Church of Canterbury, against the vicar for neglecting his duties in certain specified particulars. In the report of the case by Mr. Rothery, he states that the clerk "had on a former occasion been presented for similar offences, and admonished to attend to his duties under pain of suspension."

I find next instances of the punishment of suspension having actually been inflicted, either for contumacy in disobeying the monitions of Ecclesiastical Courts, or as interim punishment for continuance of offences charged in a suit which is an analogous proceeding. I do not place much reliance in the way of authority upon cases of suspension for disobedience to citations to appear at visitations, or to do or abstain from doing any other act directed by a bishop in his visitatorial capacity, for there may arise the objection that these are instances of the canonical or preparatory monition spoken of by Ayliffe and Oughton, followed by the definitive sentence of suspension inflicted, not for disobedience to the monition, but for a substantive ecclesiastical offence persisted in, notwithstanding the monition. At the same time with regard to them the observation I have already made is pertinent, that the fact, that under any circumstances of summary procedure a monition was followed by suspension, is, at least, some argument that this punishment was by ecclesiastical law and practice appropriate to the enforcement of monitions generally. The records then of three cases of suspension for nonappearance at a visitation after a monition to appear have been produced. Passing from them I come to other cases more directly in ponit. In *Jones* v. *Curtis* (2), already quoted, the clerk when cited to appear in the Archdeacon's Court did not at first obey the citation. He was therefore pronounced contumacious and decreed to be suspended. In *Clewer* v. *Pullen* (1), also already quoted, the clerk was on the institution of the suit, and upon his prayer, absolved from a sentence of suspension, which he was under for having absented himself from a visitation held by the archbishop at Croydon;

(1) No. 79. (2) No. 119.

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but subsequently on a petition from some of the parishioners of Croydon, representing that the clerk still neglected his duties, and praying that a curate might be appointed to perform them, the Court again suspended him pendente lite, and sequestered the profits of the benefice to be applied by the churchwardens in providing a curate. This, therefore, is an instance of suspension for acts done after the commencement of a suit. In *Harrison* v. *Archbishop of Dublin* (1) the clerk was monished at a visitation by the archbishop to extract within a month from that time a licence to serve the cure of souls, and to preach in the parish church of St. John's, Dublin. The monition was not obeyed, and the clerk not appearing in the Archbishop's Court was pronounced contumacious, and sentenced to be suspended for his contumacy in not appearing. The fellow case of *Higgins* v. *Archbishop of Dublin* (2) is subject to the observations which I have made upon cases of suspension for non-appearance at a visitation, for although similar in most of its circumstances to *Harrison* v. *Archbishop of Dublin* (1), it differs from that case in this particular, that the sentence on suspension was inflicted for the disobedience to the archbishop's monition to extract a licence instead of for contumacy in no appearing, and might therefore be looked upon as the definitive sentence in a summary cause instituted and tried by the archbishop in his visitatorial capacity. I am quite free to admit the force of the criticisms made upon cases such as those found in Mr. Rothery's Return, and in which, looking to the character of the tribunals in which many of the cases arose, irregularities of procedure would not be unlikely to occur. Still the fact remains that reported cases, so far as any can be found bearing upon the point, confirm the views of the text-writers, and prove that that has been done which it is à priori reasonable to expect could and would be done. Lastly, come the cases of *Martin* v. *Mackonochie* (3) and *Hebbert* v. *Purchas* (4), to which I have already referred, and in which the Judicial Committee of the Privy Council upon three occasions entertained no doubt as to its power to suspend, and did suspend, a beneficed clerk for disobedience to monitions of the same kind as that issued in the present case. The applications made to

(1) No. 135.
(2) No. 136.
(3) Law Rep. 3 P. C. 52, 409.
(4) Law Rep. 4 P. C. 301.

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the committee were ex parte, the cases cited upon the applications were not strong, but putting these objections at their highest, it cannot but be allowed that the decisions in these cases are entitled at least to some weight, as strengthening a view which has very considerable support even without them. But the lack of authority in the opposite direction on this point, as on the former, still further strengthens this view. The *Bishop of Lincoln* v. *Day* (1) has been cited as such authority, but, upon reference to that case, it appears that the doubt of the learned Judge of the Ecclesiastical Court was not as to the mode in which his sentence could be enforced, but arose upon the original hearing when he doubted whether, according to ecclesiastical practice, he could deprive a clerk of his benefice for drunkenness. Putting aside this case, which has no bearing upon the matter in hand, not a single passage in a text-book, not a single record, not a single reported case has been produced, from which any affirmative argument against the propriety of Lord Penzance's action in the present case can be deduced. The only authority upon which the respondent can reasonably rely is the Report of the Ecclesiastical Commissioners in 1832, in which at page 16, in respect of process, and at page 67 in respect of orders of Ecclesiastical Courts generally, the means of enforcement is stated to be that provided by statute. Unless, however, the statute itself provides that this shall be the only means, I cannot, even assuming that the commissioners intended to affirm that it was the only means, accept their statement as satisfactory, in the face of the reasons and authority to the contrary upon which I have already commented. But the statute does nothing of the kind. All that it does do is, in lieu of excommunication and its consequences, where used as a punishment for non-compliance with the orders or decrees as well final as interlocutory of the Ecclesiastical Courts, to substitute the declaration of contumacy, the significavit, the writ de contumace capiendo and imprisonment under it for a period not exceeding six months. It leaves excommunication untouched, as a spiritual censure for offences of ecclesiastical cognizance, when pronounced in definitive sentences or interlocutory decrees having the force and effect of definitive sentences. It is silent upon the subject of

(1) 1 Rob. 724.

suspension, whether looked upon as an eccleciastical censure in a definitive sentence or as a punishment for contumacy: and if suspension was appropriate and lawful punishment for contumacy before the Act it remains so still. That it was a lawful and appropriate punishment for contumacy I feel bound to hold.

But it is said that even if this be so, the sentence of Lord Penzance is still bad, as assuming to punish the respondent upon summary process, not merely for his contumacy, but for the fresh ecclesiastical offences which constituted that contumacy. The objection may, in my opinion, be answered, first, by the fact that Lord Penzance in his decree in terms assumes to punish the respondent for conduct consisting of certain specified acts, that such conduct he pronounces to be, as it was, disobedience to the monitions, and as such contumacy. The decree, therefore, on the face of it shews jurisdiction. It must speak for itself, and upon a reasonable interpretation the declaration, that the respondent by his conduct had repeated the offences previously proved against him, is nothing more than a mode of shewing the grave character of the acts evidencing the contumacy, and justifying the severe punishment to be applied to that contumacy. But, secondly, however, the decree may be read, inasmuch as it shews on the face of it jurisdiction to inflict the particular punishment for the specified acts, that jurisdiction cannot be said to have been exceeded so as to render the decree bad, because while designating and punishing those acts by a name which is appropriate to them in reference to his jurisdiction, Lord Penzance designates and punishes them also by a name which is also appropriate to them in their nature, but under which, apart from any reference to the monitions, they would not have been punishable upon summary process. The character of the acts, as constituting contumacy, and the punishment inflicted in respect of them, which is appropriate to contumacy, is in no way altered by the additional name given to them.

I have dealt now with all the objections that have been taken to the regularity of the proceedings against the respondent, and arrive at the conclusion that they were warranted by ecclesiastical law and practice, and do not violate any statutory provision. But upon the assumption that no statutory provision is violated,

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it appears to me further that the proceedings would not have been properly the subject of a writ of prohibition, even if they had not been warranted by ecclesiastical law and practice. We have in this case, the Court of Arches, a Court of competent jurisdiction seized under letters of request, and through the medium of a properly instituted suit, with jurisdiction over the respondent in respect of certain offences against ecclesiastical law. The mode in which that suit is to be conducted, the sentence which it is open to the judge to pronounce, and the means by which that sentence is to be enforced, are all, in the absence of statutory provision relating to these matters, to be regulated by the practice of the Court itself, and in respect of which if the judge errs, appeal and not prohibition would be the proper remedy, unless his error involves the doing of something which, in the words of Littledale, J., in *Ex parte Smyth* (1), is "contrary to the general laws of the land," or, to use the language of Lush, J., in the Court below, is "so vicious as to violate some fundamental principle of justice."

But I entirely fail to see how this can be predicated of proceedings which really amount, as I have already pointed out, to no more than this, viz., a Court in a suit the object of which is to put a stop to certain illegal practices, and having power to inflict a severe sentence, inflicting a light one upon the condition that the practices which it condemns and orders to be discontinued are so discontinued, and inflicting, upon the practices being repeated, a punishment which would have been appropriate in the first instance if the respondent had announced his intention of continuing to break the law. No one could complain if the judge of an Ecclesiastical Court were to suspend any sentence of punishment with the view of enabling an offending person, by submission and desistance from the illegal practices charged against him, to escape punishment altogether. How does such a suspension of the sentence practically differ from a sentence which is only a monition to abstain from such practices? In both cases the ultimate punishment would be brought about through the medium of summary proceedings by which the judge would be informed of the offender's conduct. If the two courses are practically the same, is

(1) 3 A. & E. 719, 724.

there any substantial distinction, if instead of the sentence being a monition and no more, it is a monition appended to a sentence of light punishment in a case where the judge thinks that some punishment should be at once inflicted? Can it reasonably be said that any fundamental principle of justice is violated by the adoption of such a course? I think not. It appears to me only another mode, not less favourable to an offending clergyman, of arriving at the result which in *Ex parte Rose* (1) was arrived at through the medium of a long term of suspension, to be followed, in the event of continuance of misconduct, by further punishment, until the bishop was satisfied of the offender's complete amendment of life, and as such appears to me most just and reasonable. The power to adopt either of these modes for the reformation of an offender, is no doubt open to abuse, as almost any judicial power must be. But as in other cases so in this, judges must be trusted, and may happily be trusted to exercise their functions with moderation and good sense, and I cannot anticipate that either monitions will be appended, except in suitable cases, or that clerical offenders, who have bonâ fide and for a substantial period complied with the monitions addressed to them, are in any danger of being held under the garb of contumacy or contempt in a sort of bondage to the ecclesiastical judge. It is well, on the other hand, that for offenders who persistently disregard orders which they are bound to obey, there should be a speedy and summary method of enforcing obedience, and in no class of cases is this observation more applicable than in cases like the present, where the rights of parishioners to have the services in their parish church performed according to law are involved. In such cases the monition really assumes in substance as well as form the character of an injunction to do or abstain from something of a civil character, and may therefore most reasonably both be appended to the definitive sentence, and also, if disobeyed, be enforced.

On all points, therefore, I feel compelled to differ with the views of the majority of the Court below upon this case. So differing, as well as from some of my colleagues in this Court, I realise that there may be and probably are flaws in my own

(1) 21 L. J. (Q.B.) 341.

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reasoning. But I must observe in conclusion that much of what I have said in support of my opinion upon this case might be displaced without altering the opinion itself, and for this reason: The writ of prohibition, valuable as it is when kept within proper bounds, is a weapon not lightly to be used; and in days when ecclesiastical judgments are subject to the supervision of a tribunal comprising all the elements which go to the making of a trustworthy court of appeal, the confidence which must be felt in that tribunal, as well as the comity which should exist between courts, require that the interference on the part of the temporal Courts with matters of ecclesiastical concern should be reduced to a minimum, and it is for a Court of Prohibition to be punctiliously careful not to assume the functions of a court of appeal. No one, I think, who has weighed the arguments adduced by the parties to this appeal, and considers the difference of opinion which exists upon the points in dispute both in the Court below, and I regret to say in this Court, can positively affirm that either Sir Robert Phillimore or Lord Penzance has *clearly* mistaken the practice of his own court, or that what either of them has done is to quote the words of Littledale, J., in *Ex parte Smyth* (1), "manifestly out of the jurisdiction of the Court." That which has been done is what the supreme ecclesiastical tribunal has said may be done, and has itself done. It is something, the irregularity of which at least admits of a doubt. The proceedings against the respondent have resulted, however irregularly, in appropriate punishment being applied to proved acts of misconduct, and under such circumstances I cannot but think that the only safe, and, as a consequence, the only proper course for the Court below to have pursued, was to refuse to interfere with the proceedings of the Ecclesiastical Court. I am of opinion, therefore, that this appeal should be allowed, and that the order for the writ of prohibition should be discharged.

COTTON, L.J. The facts of the case, and the circumstances under which this appeal came before us, have been sufficiently stated.

It was argued for the appeal, that the matter dealt with by

(1) 3 A. & E. 719, 724.

the order of the 1st of June was one within the jurisdiction of the Ecclesiastical Court, that the order was duly made in accordance with the law and practice of the Ecclesiastical Court, and that, even if the judge in making that order had fallen into any error of law or practice, that was ground for appeal only, not of prohibition.

It is in many cases difficult to draw the line between that which is matter of appeal and that which justifies the issuing of a prohibition. But the general rule is clear, that if the Court of limited jurisdiction, in dealing with a matter over which it has jurisdiction, has fallen into an error of practice or of the law which it administers, this can only be set right by appeal, and affords no ground for prohibition. When, however, an Act of Parliament has imposed restrictions, as to the circumstances under which a Court of limited jurisdiction is to act in matters otherwise within its jurisdiction, then, if the Court of limited jurisdiction disregards the restriction so imposed, and acts in violation of the statutory restrictions, the party aggrieved has a remedy by prohibition, even although the Court of limited jurisdiction may have put a construction on the Act, and there is an appeal from its decision. Moreover, for the purpose of deciding whether, in fact, an order is contrary to the provisions of an Act of Parliament, the Court to which application is made for a prohibition may have to inquire and determine what is the law and practice of the Court of limited jurisdiction, and to decide whether that Court has in the matter complained of acted in accordance with the law which it administers, and with its established rules of practice.

In this case it was contended for the respondent that the order of the 1st of June is contrary to the provisions of the 23rd section of the Church Discipline Act. That section is as follows: "And be it enacted that no criminal suit or proceeding against a clerk in holy orders of the United Church of England and Ireland for any offence against the laws ecclesiastical shall be instituted in any ecclesiastical court otherwise than is hereinbefore enacted or provided."

The question on this appeal is, in my opinion, having regard to this section, whether the order of the 1st of June is a

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proceeding to enforce obedience to the decree of the 7th of December, 1874; or whether it is an adjudication upon acts done by Mr. Mackonochie since that decree, and sentence upon him for those acts as offences against ecclesiastical law. If it is the latter it comes, in my opinion, within the prohibition of the enactment to which I have referred, and is also contrary to the general scope and intention of the Act. The object was to prevent proceedings being taken against a clerk summarily and without due consideration; whereas, if the order be an adjudication and sentence on Mr. Mackonochie for an ecclesiastical offence which, though similar to that for which sentence was originally passed on him, is a distinct offence, and one for which a fresh suit might have been instituted against him, then the order asserts a right in the Court for all time to come, without any of the safeguards required by the Act, to adjudicate upon the defendant's acts and to pass sentence on him. Even if the order of the 1st of June is partly a proceeding to enforce obedience to the decree of December, 1874, and partly such an adjudication and sentence on Mr. Mackonochie as above referred to, in my opinion the Queen's Bench Division was right in directing a prohibition to issue, because it is impossible to divide the order or apportion the sentence.

It may be suggested that the suit against Mr. Mackonochie was duly instituted in accordance with the Church Discipline Act, and, therefore, that an order in that suit cannot be treated as a fresh proceeding, within the prohibition of the 23rd section of the Church Discipline Act. It is true that a suit continues after final decree so far as to enable the Court to enforce the decree which has been made, and to direct any lawful process to issue for that purpose. But where the matter alleged to be an offence in respect of which the suit was instituted, has been adjudicated on, and what the Court considers the appropriate sentence has been passed, the suit for the purpose of adjudication and sentence, is, in my opinion, concluded; and if the order of the 1st of June was made to punish Mr. Mackonochie for an ecclesiastical offence, it must, in my opinion, be treated as a fresh proceeding. It was argued that to allow a prohibition in the present case would make the decree of the Ecclesiastical Court nugatory, as it would deprive this Court of the power to enforce its decrees, at least where the

act of disobedience is an offence against ecclesiastical law. In my opinion this is not well-founded. I do not accede to the argument that a monition, which forms part of a decree, cannot be enforced. In my opinion it may, in the mode authorized by the Act of 53 Geo. 3, c. 127, and an act of disobedience to an order of the Court may be dealt with as such, even though it may also be an offence against ecclesiastical law. This is not questioned by considering whether the order deals with the acts of Mr. Mackonochie as offences against ecclesiastical law or as disobedience to a previous decree of the Court.

The order of the 1st of June declares that it had been proved that the defendant had done certain acts in the performance of divine service, and then proceeds as follows: "And that in so doing he had repeated the offence against the statute laws, constitutions, and canons of the Established Church of England, which were alleged against him in certain of the articles exhibited against him in this suit, and declared by the Court to have been sufficiently proved, and further had therein and thereby disobeyed and contravened the monition of this Court served upon him on the 26th day of July, 1875, and also the further monition of this Court served upon him on the 29th day of March, 1878, for which disobedience the judge did pronounce him to have been guilty of contumacy. "And for the conduct aforesaid the judge did further decree and declare that the said Rev. Alexander Heriot Mackonochie be suspended for the space of three years from the time of publishing the suspension for that purpose."

For the purpose of determining what this order is, it is necessary to consider what is the power of the Ecclesiastical Court as regards enforcing its decrees and orders. It was contended in support of the order appealed from that orders of the Ecclesiastical Court cannot be enforced by suspension. This was contested by the appellants.

The argument of the appellants on this part of the case is not, in my opinion, advanced by establishing that, according to the ancient law and practice of the Ecclesiastical Courts, suspension was always preceded by monition. For the monition which was to preceed suspension was a mere warning to give the offending clerk an opportunity of retracting his error, and submitting him-

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self to his ecclesiastical superior. This is obviously of an entirely different nature from the monition which, it is alleged, the order of the 1st of June was intended to enforce, and which was preceded by a sentence of suspension passed without any preceding monition or warning. Nor is the argument of the appellants assisted by the numerous authorities quoted to show that suspension is an established ecclesiastical censure or punishment. Undoubtedly it was in the power of the Ecclesiastical Court, in a suit properly constituted, to pass sentence of suspension as a punishment for an offence against ecclesiastical law, but the question remains whether suspension is a means of enforcing obedience to orders of the Ecclesiastical Court.

It is remarkable that the Report of the Church Courts Commissioners, made in 1832, where at pages 16 and 19 it deals with the mode of enforcing decrees of the Church Courts, makes no mention of suspension, though that part of the report must in my opinion be taken to refer to all suits in the Ecclesiastical Court, whether of a purely civil or of a criminal or corrective character, against clerks beneficed and unbeneficed, as well as against laymen. This absence of all mention of suspension as a mode of enforcing decrees is certainly, having regard to the learning and high authority of the commissioners who signed the report, very strongly in favour of the view that suspension is not an authorized means of enforcing decrees of the Ecclesiastical Court. Unless clear authority can be produced to shew that the Ecclesiastical Courts have enforced their decrees by suspension, the Report of the Commissioners is to my mind conclusive. But the authorities quoted in support of the contrary proposition are, independently of two decisions of the Privy Council, very few in number. Moreover, with the exception of one decision made by an Archdeacon's Court, they are not free from ambiguity. For in considering them and the passages in text-books referred to in support of the appellant's contention, it must be remembered that disobedience to the order of an ecclesiastical superior was an offence against ecclesiastical law, and might as such be punished. In some at least of the few instances of orders for suspension on which the appellants rely, it appears that the suspension was ordered as a sentence passed by the ordinary at his visitation

against a clerk for committing, after previous warning, an ecclesiastical offence, as in *Harrison's Case* (1), and in *Higgins' Case* (2), by preaching in a church of which the archbishop was diocesan without licence. One of the cases mentioned went to the House of Lords on an appeal presented by the clerk Harrison, who had been suspended, against the decision of the Civil Court, refusing to grant a prohibition. And this case has been relied on as a decision of the House of Lords, that decrees of the Ecclesiastical Court can be enforced by suspension. If so, this will be conclusive. But apparently the question was not and could not, on the pleadings or on the facts, have been raised in the case; for it appears from the report in 2 Brown P. C., page 200, that the clerk Harrison, by his declaration in prohibition, stated that the suspension had been decreed, not as a means of enforcing obedience to a decree or order, but in a suit instituted against him for not appearing at the visitation of the archbishop. And the defence of the archbishop was, that for this non-appearance at his visitation, and not for disobedience to an order made by him, the clerk had been declared contumacious, and decreed to be suspended. This illustrates the danger of relying on orders directing a clerk to be suspended for contumacy as authorities that obedience to a decree (in a suit which, except for the purpose of enforcing the decree, is at an end) can be enforced by suspension.

But it is said, and correctly, that in *Hebbert* v. *Purchas* (3) and in the previous case of *Martin* v. *Mackonochie* (4) the Privy Council did make orders for suspension, with a view to enforce obedience to decrees. Neither of these cases was argued by counsel for the defendant who was suspended, and the attention of the members of the Judicial Committee who heard those cases was in neither of them directed to the question which we have to consider in this appeal. Though this Court is not bound by decisions of the Privy Council, yet I should not feel at liberty to decide that what the Privy Council, the ultimate Court of Appeal from the Ecclesiastical Court, had deliberately decided to be in accordance with the law and practice of that Court was illegal and irregular. But I cannot look upon these cases as deliberate decisions that

(1) No. 135.
(2) No. 136.
(3) Law Rep. 4 P. C. 361.
(4) Law Rep. 3 P. C. 409.

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obedience to orders can be enforced by suspension. No statute has given to the Ecclesiastical Court the power to enforce obedience to their decrees by suspension. If they have the power it must be on the ground that it has been the established practice of the Church Courts thus to enforce their decrees, and that this has been acquiesced in so as to become part of the law of England. In my opinion it has not been made out that any such established practice exists, and I am of opinion that though an order of suspension can be made as a sentence on a clerk for an offence against ecclesiastical law, it cannot be made to enforce obedience to a decree, that is, as process of contempt. If this be so, the order of the 1st of June must be treated, not as made to enforce obedience to a decree, but as a sentence for the acts of the defendant as offences against ecclesiastical law. But even if orders for suspension could have been made to enforce obedience to decrees of the Ecclesiastical Courts, the question remains, has the order of the 1st of June adjudicated upon the acts of the defendant as an offence against the law ecclesiastical, and inflicted suspension as a punishment for his acts as such an offence. Suspension, if a possible means of enforcing the decree of the Ecclesiastical Court, is not the usual or recognised mode of doing so, and, having regard to this and to the terms of the order, my opinion is that the order is one made, not as a means of enforcing a decree of the Court, but as an adjudication on and sentence for an ecclesiastical offence.

This is the conclusion at which I have arrived from the terms of the order of the 1st of June, and from what is shewn to be the practice of the Ecclesiastical Courts in enforcing their decrees. What is said in another case by the learned judge who made that order, cannot be relied on for the purpose of interpreting it, but at least it shews that the terms of the order of the 1st of June were not used by accident or inadvertently. For in the case of *Combe* v. *Edwards* (1), the learned judge says: "What the Court did, therefore in the case of Mr. Mackonochie, and what it did also in this case, is this: to suspend the defendant ab officio et beneficio, not merely because he had been guilty of contumacy in disobeying the orders of the Court, but because he had also been guilty of a grave ecclesiastical offence by repeated breaches of the law

(1) 3 P. D. 114.

of the Established Church in respect of ritual." And again page 139: "The sentence of suspension in Mr. Mackonochie's case, was intended to be passed upon him not only for his contempt in disobeying the monition, but also for his breach of the ecclesiastical laws in the repetition of his original offence. And some pains was taken in drawing up the order of this Court to make the intention clear and unambiguous."

I am of opinion that the order was in violation of the 23rd section of the Church Discipline Act, and that the order appealed from ought to be affirmed.

I must, before concluding, advert to the argument that the order under appeal cannot be supported unless a prohibition can issue against the Judicial Committee of the Privy Council. I am not of opinion that this can be done. But the Court prohibited is the Court of Arches not the Judicial Committee, and in my opinion no difficulty in prohibiting that Court arises either from the circumstance that the appeal from it is to the Judicial Committee, or from the circumstance that the Court of Arches is acting on the authority of a decision of the Privy Council.

BRETT, L.J. The defendant was, on the 18th of March and on the 20th of April, 1878, served with notices to appear before the Court of Arches, in respect of certain acts alleged to have been done by him in 1876 and 1877, and on the 24th of February, the 31st of March, and the 7th of April, 1878. The defendant did not appear in obedience to either notice. The Court of Arches, in respect of the acts complained of, which were proved by affidavit to have been done by the defendant, decreed that he should be suspended ab officio et beneficio for a period of three years. The Queen's Bench Division has prohibited the Court of Arches from proceeding further on such decree. The appeal is against that prohibition.

The acts complained of were certainly such as if committed or questioned for the first time might have been treated as breaches of the Church Discipline Act (3 & 4 Vict. c. 86). Though committed after similar acts had been committed by the same defendant, and after such previous acts had been called in question and pronounced upon, it is admitted or, if not, it cannot be

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doubted, that they might nevertheless have been treated now as breaches of the Church Discipline Act, and have been proceeded against as if committed for the first time. If they had now been committed for the first time, or if they had now been treated as so committed, it cannot be doubted but that the suit brought in order to question them ought to have been instituted according to the provisions of the Church Discipline Act. This involves that there must have been new letters of request to enable the Court of Arches to entertain the suit, and upon those being granted and accepted the defendant must have been cited to appear. After having been so cited the defendant might have been, upon proof, sentenced to suspension or deprivation. But to have proceeded against the defendant otherwise than by citation would, upon the hypothesis of the acts being treated as if committed for the first time, have been to proceed in violation of the enactments of the Church Discipline Act. The acts in respect of which the order appealed against was made were however, in fact, repetitions of acts in respect of which the defendant had been before cited, tried, and sentenced. And in the sentence the defendant had been admonished to abstain from repeating the acts then complained of.

It is argued on the one side that the acts last complained of may be treated as acts done in disobedience of that monition; that the notices served on the defendant were therefore notices in that suit; that that suit was still pending in the Arches Court; that the notices, therefore, rightly called upon the defendant to appear and answer in that Court in that suit for disobedience to the monition decreed in that suit and served; and that the order of suspension was an order made in that suit, and was the proper mode of enforcing obedience to a monition issued in that suit; that that suit was properly commenced by citation; and therefore that the order complained of was no breach of the Church Discipline Act. It was said that the Arches Court had power to make the order of suspension in that suit, because it was, before the passing of the Church Discipline Act, a part of the recognised practice of the Ecclesiastical Courts to make such an order after a monition which was disregarded.

But it was argued on the other side that the Court of Arches

had no legal power to make in that suit the order complained of; because by the recognised practice of the Ecclesiastical Courts an order of suspension could only be made in a suit which treated the acts complained of as offences such as are dealt with in the Church Discipline Act; that if the acts in respect of which the order was made were treated as such offences, they ought to have been treated according to the requirements of the Church Discipline Act; in which case there ought to have been new letters of request, and the defendant ought to have been cited; that if the acts could be treated as acts of disobedience to the order made in the original suit, they could only be properly treated as acts of contempt; and then the order of suspension would be wrong, because the only power the Court has to punish for contempt is that regulated by the statute 53 Geo. 3, c. 127, namely a power to signify and thereby procure imprisonment. And it was urged that the order appealed against did in terms treat the acts complained of as offences against the Church Discipline Act.

The question thus presented is one as to the power of Ecclesiastical Courts to award under certain circumstances a certain punishment. That can only be solved by deciding what has been the recognised practice of the Ecclesiastical Courts. As if a Court of limited jurisdiction were to assert it had the power of flogging. The question whether it had such a power or not would be tested by the question whether it had ever practised such power. But practice, considered for this purpose, is not the procedure of the Court used in order to arrive at an end to which it is admitted the Court has power legally to arrive; but practice in the sense of its being evidence of the power exercised and so submitted to as to have been validly recognised as law. The question being, what is the power under certain circumstances of the Ecclesiastical Courts in England, the required evidence is not that such a power has been asserted by ecclesiastics in other countries or in this; but whether such a power, if asserted, has been admitted and adopted by the English people acting either through the legislature or by authoritative acquiescences. Such admission and adoption, I wish to state most distinctly, is in my view the only basis of any jurisdiction which can be allowed to

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any Ecclesiastical Court in these kingdoms. In accordance with this view an elaborate examination of the practice as alleged by either side was made before us. It was an examination of a system of law which may, I think, be not improperly said to be unfamiliar to every judge who has had to consider this dispute. It was an examination of a course of procedure, which to my mind is not enunciated with anything like clearness or precision by any ecclesiastical writer whose works were cited to us. It is a question therefore, in my opinion, which would almost inevitably lead to difference of opinion, and it has done so. Called upon to decide, I do so to the best of my ability. As at present advised, I confess that after long consideration the case seems clear to my mind; yet I cannot and do not pretend that my view is the right one.

6 Asp Cas 462

The question really is, what according to the practice of the Ecclesiastical Courts was the effect of a monition to abstain from repeating an offence, which monition was a part of or was issued in consequence of a sentence in a penal or correctional suit. That such a monition has constantly been and can properly be made part of a sentence in such a suit has not, I think been seriously disputed. At all events the proposition is clearly established in the affirmative. I think it is also clearly proved that there were in ecclesiastical practice different kinds of monitions, in the sense that there were monitions issued for different purposes and leading to different consequences.

There was, I think, a monition sometimes issued before or at the commencement of a suit or proceeding, in order to found upon disobedience to it a charge of contumacy in the persistent committal of an offence. There was certainly a monition which was issued in the course of the proceedings in a suit, in order to lead to and leading to the performance of a step of the process. There was a monition which was issued in order to enforce the completion of a decree, when the decree ordered something to be done or undone, such that, until that something was done or undone, the decree had no effect or incomplete effect. A sentence in a criminal suit might contain such a monition, which was in effect an order, as for instance, if there were in the sentence an order to perform penance, or to repair a chancel, or to take down a cross,

or to cease cohabiting, or the like. In such a case it cannot but be observed that, without any new offence by the defendant, the offence proceeded against would not be punished, the order in the decree would not be fulfilled, until the thing ordered to be done or undone was done or undone. It is indisputable, as I said before, that there was also a monition, which was also contained in a sentence in a criminal suit, which, without ordering anything then existing to be done or undone, admonished the defendant in general terms to abstain from repeating the offence. And this monition or admonition formed either the whole of the sentence or was a part of it adjoined to some specified punishment. In the first case I have mentioned, if there were contumacious disobedience, there would be a suit or proceeding and sentence according to the nature of the offence. It cannot be maintained, I think, that if the offence itself were, for instance, a breach of the Church Discipline Act, the case could be taken out of that statute, so that the suit might be commenced or continued contrary to the provisions of that Act, by means of a preliminary monition and a disregard of it, which might enable the Court to consider the defendant contumacious. In the second and third cases it is not, I believe, disputed, but that disobedience is contempt which may be punished by signification and imprisonment until obedience is produced. It may be suggested further that for a continued or contumacious disobedience to such last mentioned monitions a clerk might be further punished by suspension a beneficio or by deprivation. If that is a part of the suggestion its accuracy is not admitted. Its accuracy becomes one of the matters for consideration. But the principal question in this case arises with regard to the fourth kind of monition. It is distinguished from the third by this, that in respect of the past offence the sentence of which it forms a part, is by the passing of the sentence itself completed. In the former case if no new offence be committed, the sentence is nevertheless not fulfilled until the order contained in it is obeyed; in this latter, unless there be a new offence, the sentence is completely satisfied. The question is, what is the power of the Ecclesiastical Court after it has in a sentence in a criminal suit enunciated the last kind of monition? The power is to be proved by the practice. On

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the one side it is said that by the recognised practice this power is proved, that the Court may on a repetition of the offence by a beneficed clergyman order him to appear and sentence him to suspension a beneficio, or to deprivation; on the other side it is said that no such practice can be shewn to have ever existed, that no such practice has ever been recognised, that no such power is therefore proved. The proposition in dispute is this, that it was the practice of the Ecclesiastical Courts, after a monition in a sentence admonishing the defendant to abstain from repeating the offence, and a subsequent alleged repetition of the offence, to summon the clerical delinquent to appear, and upon proof of the repetition to sentence him to suspension a beneficio, or to deprivation. Whether this proposition is correct or not depends entirely on authority. They who assert that there was such a practice have an affirmative proposition to prove; they who deny it have a negative proposition to support. The one should be able to shew the practice; the others need only say that no such practice can be shewn. If no practice be shewn, those who maintain the negative should succeed. It is no valid argument to say that there is no authority to the contrary of the alleged practice. Unless the practice is established affirmatively, those who maintain the negative should logically succeed. But if in the sources in which one would naturally seek for proof of the affirmative proposition, one finds all kindred propositions affirmed but this omitted, it seems to me that the conclusion is immensely strengthened that the negative of the proposition is proved.

Now the first source to which one naturally resorts is that of the books of recognised authors on the practice of the Ecclesiastical Courts. It is useless to go again through each passage that was cited to us. We went through them for nine days. Every possible comment has been made on them. I have read them again as carefully as I could. It seems to me that there is no assertion of the suggested practice in Conset, or Oughton, or Ayliffe, or Lynwood, or Coote; none in Burns, or in the works of Sir R. Phillimore. In the latter there is the passage cited by the Lord Chief Justice, which certainly seems rather to question than to recognise the doctrine laid down in the Privy

Council cases. In the judgment in *Combe* v. *Edwards* (1), Lord Penzance cites Oughton in support of a proposition which the learned judge thus enunciates: "The ancient and proper methods of enforcing obedience to the ecclesiastical law, *and to the decrees of the Ecclesiastical Courts*, is by the infliction of ecclesiastical censures." But with great deference, the quotation supports only the general reference "to ecclesiastical law," and does not support that for which it is cited, namely, its reference to "the decrees of the Ecclesiastical Courts." Neither does the passage cited from Godolphin, at p. 109. The contumacy there mentioned is a persistence in conduct, against the continuance of which there has been a monition as the foundation of the suit. In such cases the contumacy exists before the sentence. One then turns to the books of forms. I find forms apparently for every step in an ecclesiastical suit, but in no book any form for the notice, the application, or the sentence in question, or any note or direction referring to such important steps. The decisions to which we have been referred are of three kinds—those in the regular ecclesiastical reports, those in the common law reports on applications for prohibition, and those in Mr. Rothery's collection. In the first, one would wish to find instances clearly in point, that is to say, where upon such an application as was made in this case to Lord Penzance, after a monition such as is in question in this cause, a notice to appear has followed, and thereupon a sentence of suspension a beneficio or of deprivation. It is useless to go again in detail through all the cases. It is obvious that there is no such case; I mean there is no case in which it is reported that this thing has been done. *Fendall* v. *Wilson* (2) and *Bishop of Salisbury* v. *Williams* (2) shew only that a monition may be part of a sentence; they do not shew whether any action can be taken afterwards in the same suit on a repetition of the offence. *Blackmore* v. *Brider* (3) is relied on, because in his judgment or sentence Sir T. Nicholl uses the expression "under pain of law," and *Burgess* v. *Burgess* (4), because Lord Stowell says: "If obedience be not given to this order, excommunication and other consequences will necessarily follow." And Dr. Lushington has,

(1) 3 P. D. 103, at p. 108.
(2) 2 Moore's P. C. (N.S.) 375.
(3) 2 Phillim. 359.
(4) 1 Cons. 138.

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in giving judgment, used similar expressions. It would not be candid, I think, to say that these are not at least important indications in favour of the affirmative proposition; but it seems clear to me that they are not the authority one would wish or expect to find. They are certainly consistent with the view of their being minatory cautions as to probable further proceedings, which would however be obliged to bear the form of a newly instituted suit.

I turn more anxiously to the authorities in cases of prohibition for reasons which I shall directly give. It seems to me that there is not one reported case in which even an application for a prohibition against this alleged practice has ever been made. I cannot with deference think that *Harrison's Case* (1) raised this question, or that the House of Lords decided this question. The declaration in prohibition was pointed to other matters. I cannot see that the present question was ever hinted at in argument. The absence of any case of application for a prohibition is, to my mind, of the strongest significance. The difference in the position of an accused person, lay or clerical, and of the different bishops, according as this alleged power of keeping the accused person under the perpetual surveillance of the Court of Arches can or cannot be exercised, has been shewn to be immense. That difference, however great, is doubtless no conclusive argument of itself against the existence of the alleged power. Such a power, however despotic, may have been so acquiesced in as to have become part of the law of England. But that difference is so great, and in the case of a clerk suspended from or deprived of his benefice touches him so sensitively, that it seems to me beyond the bounds of any practical probability to suppose that the alleged power can have been exercised so as to have become a practice, without ever having been even challenged. The absence of any authentic evidence of challenge by application for a prohibition, is, to my mind, evidence of the strongest kind that the power has never been attempted till lately to be exercised.

As to the use of the cases collected by Mr. Rothery, I think it obliges one to make this remark. They are decisions of many different Ecclesiastical Courts. If they shewed a constant practice,

(1) 2 Bro. Par. C. 199.

such as is alleged, it being also shewn that their decisions on the point had not been appealed against, I should think such uniformity of practice and such want of appeal would prove that such practice was generally acquiesced in, and should think the affirmative proposition now in question was proved. But if there be only some isolated instance or instances of decisions by judges of minor courts, I think, with deference, that such decisions fail to prove a recognised practice. Now at the most I think there is some isolated instance. In my judgment there is no indisputable instance in those cases of the exercise of the alleged power. Those cases were microscopically considered in the argument. It is wholly unnecessary to go through them again in detail. There is yet another place in which, if this power was ever exercised, one would expect to find it recorded, namely, among the records of the Court of Arches. But I gather from Lord Penzance that no record, not even a note in any registry book, can be found referring to such a thing as having been done.

I cannot with great deference think that the observation that until lately Englishmen have been law-abiding people, and have obeyed the law, is a satisfactory answer to these most striking deficiencies of any evidence of the alleged practice. Englishmen may have been law-abiding, but they have not been unlitigious. And a beneficed clergyman, suspended from or deprived of his benefice, would be inclined to contest the law to the last, though he might not resist it by force, which is the sole meaning of this somewhat popular apothegm, hardly to be relied on as a maxim of law. But there is another authority which in my opinion is decisive of this controversy. No more learned assembly of English ecclesiastical lawyers could be brought together than those who were joined in the commission of 1832. They were directed to make "a full and diligent inquiry into the course of proceeding in suits and other matters instituted or carried on in the Ecclesiastical Courts from *the first process and commencement to the termination thereof*, and into the process, practice, pleading, and other matters connected therewith; and to inquire whether any and what parts thereof may be conveniently and beneficially discontinued or altered, &c." If they had described this alleged practice I should have thought their assertion of it conclusive. But if they have

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totally omitted even to allude to it, it seems to me that such omission is absolutely fatal to the contention that such a practice existed. The importance of such a practice cannot be denied. That it was a practice worthy of consideration is surely obvious. The supposition that this part of ecclesiastical procedure, if it existed, could be overlooked on such an occasion, or was so familiar that it was thought unprofitable to allude to it, seems to me to be outrageous. If there be this total omission by such men on such an occasion, it seems to me that such an omission is negative evidence of the highest force. Now, having read that report with the utmost attention, I come to the conclusion that they have not even alluded to the existence of such a practice. They profess to deal with criminal as well as other suits. They speak expressly of suits for the correction of offences committed by the clergy. They say that "offences *are punished by* monition, penance, excommunication, suspension ab ingressu ecclesiæ, suspension from office, and deprivation." The first "punishment" here described is "monition." It is classed with all the other known punishments. It is not here described as a process leading to punishment, but as one of a set of punishments. The commissioners then in detail describe each successive step of a suit, civil or criminal, "from the first process and commencement to the termination thereof." The first step is said to be citation. Then follow the different steps of the intermediate process. "The mode of enforcing *all process*, in case of disobedience, is by pronouncing the party to be contumacious; and if the disobedience continues, a significavit issues upon which an attachment from Chancery is obtained to imprison the party till he obeys." So they proceed until the judgment. "The judgment of the Court, they say, is then pronounced upon the law and facts of the case," &c. "And that is done in open Court," &c. "And thus the matter in controversy between the parties becomes adjudged." We know from the argument of Dr. Stephens that this judgment in open Court has the force of a definitive sentence in writing. And then follows this exhaustive statement. "The execution of the sentence is either completed by the Court itself, such as by granting probate or administration, or signing a sentence of separation; or remains to be completed by the act of the party, as by exhibiting

an inventory and account, by payment of the tithes sued for, and other similar matters, in which cases execution is enforced by the compulsory process of contumacy, significavit, and attachment." The instances are given as examples, not as an exhaustive list. The commissioners afterwards report the ancient mode of proceeding of bishops in order to enforce their authority over clerks, a summary procedure. "This summary procedure was, they say, discontinued. Afterwards, Bishop Gibson was desirous of reviving it, but his clergy resisted, and it was ultimately found impossible to resist their demand." "Proceedings against clergymen for ecclesiastical offences have, accordingly, in modern practice been uniformly conducted by the same rules of proceeding as are observed in other criminal cases in the spiritual Courts." They say afterwards, "We have already described the course of proceeding and the mode of punishment, in causes of correction."

Now the only course of procedure which they had described was that course ending with the sentence where it was complete; or if it was to be made complete by an act of the Court, then by the performance of that act by the Court; or if it was to be completed by the act of the party, then to be enforced by the compulsory process of contumacy, significavit, and attachment. But these are described as "compulsory process." A process to compel the doing of something without the doing of which the sentence for the past offence is incomplete. Process is not punishment; but a monition is described as one of several punishments. A monition is the act of the Court. When the monition therefore is part of the sentence, the sentence is completed by the act of the Court, namely, by issuing the monition. There is no statement by the commissioners that, if after sentence of monition to abstain from repeating an offence, a beneficed clerk repeat the offence, he can for that repetition be ordered by notice to appear, and can be pronounced contumacious, and be thereupon further sentenced to suspension a beneficio or to deprivation. But there is more. The commissioners were bound to suggest alterations if they thought them expedient, and they thought the powers of the Ecclesiastical Courts insufficient. "The power of enforcing their orders at present vested in the ecclesiastical tribunals is regulated by Statute, 53 Geo. 3, c. 127. The Court pronounces the individual

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who has failed to obey its orders in contempt, and afterwards signifies such contempt to the Court of Chancery; whereupon a writ de contumace capiendo issues, and the offender is committed to prison." "We think that in all cases of disobedience there should be a power to attach the party and distrain upon his property. It does appear wholly inconsistent with any sound principles of jurisprudence that exclusive right of adjudicating on certain subjects should be vested in any Court, and yet that Court be left without the means of carrying its decrees and orders into effect." It appears to me to be quite impossible that those who stated such want of power in the Ecclesiastical Courts, and advised such remedies, could have known of the power now claimed. And if those commissioners did not know of this power, it never existed. Considering then the total absence of any allusion to this power in ecclesiastical works, in which if it had existed it must certainly have been described, the total absence of any instance of its exercise in the ecclesiastical reports, the total absence of any report of a claim to prohibit its exercise, and the total absence of any mention of it by the Ecclesiastical Commissioners of 1832, it seems to me that the necessary inference from this want of evidence is, that this alleged power has never, till lately, been exercised. And again, I must say that in my opinion, unless it had been so exercised without objection, and so exercised as to shew that it had been submitted to, it is no part of ecclesiastical law adopted into the law of England. It seems to me that the result of the evidence as to the exercise of the alleged power is, that a monition to abstain from repeating the offence is sometimes decreed in a sentence as the punishment or part of the punishment for a past offence; and when it is so decreed and issued by the Court, the suit is entirely terminated; and that for a repetition, if any, of such offence there must be a new proceeding according to the nature of the offence. But against this it is said, that there can be no finality in a sentence of an ecclesiastical Court, because all ecclesiastical correctional procedure is pro salute animæ. In order to support this argument, the meaning to be attributed to this maxim must be that the whole ecclesiastical procedure is used solely for the purpose of forcing the particular delinquent to do or cease from doing that which is charged as the

offence. But surely a correctional suit can be maintained against a clergyman for past immorality, or drunkenness, or other past offences, though he has before the suit obviously ceased to offend in the like way. And certainly deprivation cannot be a mode of forcing the individual offender to perform his clerical functions in the ordained way. This maxim is with deference too general to be a rule. It seems to me to be quite as applicable to lay as to ecclesiastical legal punishments. No legal punishment is inflicted for revenge; all are for correction of the individual delinquent or others. All are pro salute animarum. Another objection taken, as I understand it, is that such a monition as is under discussion is classed by ecclesiastical writers as a "censure" and not as a "punishment," and that a "censure" is in ecclesiastical nomenclature a warning only and not a punishment. But with deference, though some monitions are in ecclesiastical law only warnings, this monition, which is always part of a sentence, and is used nowhere but in a sentence, is classed under the terms "censures" with "suspension" and "deprivation," and deprivation cannot with any propriety be called a warning to the individual, though like every other punishment it is a warning to others who may be inclined to offend in the same way. Another objection, as I understand it, now taken is, that for such acts as are now in question, namely, acts of repetition of an offence after a sentence containing a monition to abstain from repeating the offence, the Court might proceed to excommunication, and that excommunication is a greater punishment than suspension or deprivation, and that it includes them, so that the power to excommunicate involves and includes the power to suspend or deprive. Now in my opinion, as I have said, the Court could not excommunicate for these acts without a new suit; but if it could, can it be said that excommunication involves suspension a beneficio or deprivation? It does ex necessitate involve suspension ab officio; but is it a recognised admitted fact in the law of England that an excommunicated clerk would thereby be deprived either for a time or for ever of the temporalities of his benefice? I think not. If not, excommunication does not include these other punishments. One cannot include the other, if when the greater is passed it does not necessarily involve the effect of the other. But further

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if in any sense excommunication could be said to include suspension a beneficio or deprivation, I cannot accede to the proposition that in England in penal jurisdiction the admitted power to award a particular punishment involves the power of awarding every lesser punishment. A power to imprison does not give a power to fine. The objection, that without this power the Ecclesiastical Court has not sufficient means of enforcing its will, has been often taken on behalf of claims make by the Ecclesiastical Courts, but has never availed in an English Court of Common Law. In conclusion, therefore, I am of opinion that the part of an ecclesiastical sentence which consists of a monition to abstain from repeating the offence is final, and no ulterior step of any kind can be taken in respect of it.

I must not omit to refer to the cases in the Privy Council. I must agree that we have not in them the matured view of the very learned judges who sat there. I only wish sincerely we had.

It is necessary further to say that every reason I have given for coming to the conclusion that no ulterior step of any kind, except the issue of it, can properly be taken in respect of a monition such as is in question, is still more forcible for saying that if any ulterior steps can be taken the only ones are excommunication, significavit, and imprisonment.

If no step could properly be taken in the original suit after the sentence, it follows that the acts complained of could only be punished as breaches of the Church Discipline Act. Then the proceedings should have been begun by citation; they were not; there has been a violation of the enactments of the statute; and it is not denied that prohibition will lie.

But if it were true, which I think it is not, that some proceeding could legally take place in the original suit in respect of the acts complained of, the only sentence which the Ecclesiastical Court had legal power to pronounce thereon was a sentence of excommunication to be followed by imprisonment. In such case the suit would have been properly commenced by citation, but the sentence would be one which the Court would have no power to pass against any one for what must then be admitted to be the offence, namely, contumacy in disobeying a monition. When a Court of limited jurisdiction, in a criminal suit properly brought

before it, passes a sentence which it cannot legally pass against any one in respect of the offence it assumes to punish, I cannot doubt but that it exceeds its jurisdiction, and is liable to prohibition. Such a sentence is not one which the Court could by correct process pass in respect of the offence, but which it arrived at in the particular case by an erroneous process; it is a sentence which it cannot legally pass by any process in respect of the offence charged, and that, because the Court has no power to pass such a sentence for such an offence. Doing that which is in excess of the power of the Court is doing something in excess of jurisdiction. Excess of jurisdiction is ground for prohibition. The case of *Ex parte Rose* (1) is not to the contrary of this. No one who has any knowledge of ecclesiastical decisions could doubt but that it had been the constant practice of the Ecclesiastical Courts to require the certificate therein questioned. The point taken was that however constantly it had been required, however often the power had been exercised, it was contrary to natural justice. This objection was overruled, and thereupon the prohibition was refused. The production of this certificate is an act to be done by the defendant in order to complete the original sentence. It must be produced, though the defendant should have committed no new offence.

It was argued that prohibition would not lie to the Ecclesiastical Court because it would not lie to the Privy Council. Whether in any case prohibition would lie to the Privy Council, or to any litigant or officer who should be about to execute an order made in council upon the advice of the members of the Judicial Committee, I think it is unnecessary to determine. It seems very difficult to say that it would lie. I am unwilling to say without further argument that it would not. But I cannot agree to the proposition that because there is an appeal to a Court which cannot be prohibited, therefore the Court of limited jurisdiction of first instance cannot be prohibited. There is an appeal from the county courts to a division of the High Court. The Division of the High Court cannot be prohibited. Can it be maintained that a county court could not be prohibited? The argument that prohibition will not lie, though the sentence of the Court was wrong,

(1) 21 L. J. (Q.B.) 341.

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comes to this: The Court could have summoned the defendant by notice to appear and answer for contempt, and could have punished him by imprisonment. The Court by citing the defendant according to Act of Parliament, could have punished him for an offence by suspension. Therefore you cannot prohibit the Court which summoned him for contempt, and punished him for an offence within the statute. I think that such a mixing up of powers is an excess of power.

I come to the conclusion that the sentence pronounced by Lord Penzance cannot be supported.

I think that the effect of supporting it would be to revive the exercise of the power of summary correction which Bishop Gibson tried to revive and failed to revive. I think we have no authority to impose this fetter upon the clergy of the Church of England. I do not feel entitled in a judicial decision to give any opinion as to whether it might or might not be expedient to impose it. That is a question for legislation, not for adjudication. I am of opinion, as matter of law, that the judgment of the Queen's Bench ought to be affirmed.

JAMES, L.J. The conclusion which I have ultimately arrived at is on considerations which I am able to state and propose to state briefly.

I need not repeat the history of the case.

Mr. Mackonochie, in substance, complains that the proceedings before the Dean of Arches were in violation of the provisions of the Statute of Citations and the Church Discipline Act, inasmuch as the preliminary forms and proceedings required by the latter had not been taken, and no letters of request had been addressed by the diocesan, so as to give the archbishop's judge jurisdiction in the matter.

To this it is answered that the proceedings were the legal consequence and continuation of a proceeding in a suit duly instituted against Mr. Mackonochie in the Arches Court—a consequence and continuation warranted by the established law and practice of the Courts Christian, and not forbidden by, or inconsistent with, any provision or principle of the general law of the land.

Are those propositions true? I cannot bring myself to doubt

that the monition in the suit was properly inserted therein in accordance with uniform usage, whereof the memory of man runneth not to the contrary, and having the express sanction in comparatively modern times of the most eminent ecclesiastical judges—men in learning and judicial authority surpassed by none. Nor can I accede to the suggestion that the monition was, or was intended to be, a mere reprimand and warning. I can understand a man's being let off with a reprimand or warning, but to append in a recorded sentence a reprimand or warning to a substantial and severe penalty would seem to me an unseemly joke more in place in scenâ than in foro. To my mind it is clear that the monition was intended to be an effective judicial sentence, in no wise differing from such monitions as the following, which have actually been made.

A monition to make good and discontinue waste and dilapidation in the church fabric; to remove idolatrous images, and discontinue superstitious processions; to restore to its proper condition and purpose, and duly to use a church which had been degraded into a farm outbuilding; or such a monition as the following, which I am sure would be made, to restrain an eccentric clerk who should be minded to fill his church by appearing in a series of theatrical costumes and giving theatrical imitations of distinguished preachers, orators, and actors.

I conclude that the monition was a serious monition intended to be obeyed and be enforced like any other effective judicial sentence.

Now in considering what is the proper legal result of such a monition, and of disobedience to it, it is necessary to bear in mind that the acts of Mr. Mackonochie complained of present themselves under a double aspect. They are ecclesiastical offences, aggravated by their being also a contempt of Court; they are a contempt of Court aggravated by their being ecclesiastical offences.

Now the jurisdiction to deal with the ecclesiastical offence undoubtedly belongs exclusively to the ordinary. Treating the matter as an ecclesiastical offence, it is for him to allow or not to allow the office of judge to be promoted; it is for him to take or to abstain from taking the necessary preliminary steps; it is for him to determine whether he will allow the proceeding to be

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determined by his own judge, or whether he will defer the proceedings and trial to the judge of his metropolitan. But on the other hand, it is for the Court whose order has been disobeyed to enforce obedience or to punish disobedience. And the contempt of Court—the judicial contempt—is a matter wholly irrespective of the character of the acts in and by which that contempt has been shewn. That character may affect the quantity or nature of the coercive or punitive consequences, just as the circumstances of a felony or a misdemeanour affect the punitive consequences thereof. But a contempt is not the less or more a contempt because it is a felony or a misdemeanour.

A murderous assault on a process server would be a contempt of this Court, but it would be for another tribunal to deal with it as a case of wounding with intent to do grievous bodily injury.

The fact that the contumacy or contempt was in acts being themselves substantive ecclesiastical offences appears to me, therefore, wholly immaterial. That fact could not give jurisdiction. It could not, on the other hand, take away the jurisdiction, any more than the power of the common law courts to deal summarily with a contempt of Court by fine and imprisonment is taken away by the fact that the contempt was shewn in and by an act being an indictable felony or misdemeanour.

Then the problem reduced to its simple and abstract form is this: Had the Court of Arches power to visit contempt with suspension? Or, to take a concrete case, as to which there can be no sectarian partisanship, passion, or prejudice—the case of an order to a husband in a suit for restitution of conjugal rights, to take back his wife and treat her properly; or an order to a parson to discontinue using the church to stable his horses. Now, in considering this question it is to be borne in mind that the Church Christian had no sheriff, serjeant-at-arms, bailiff, or constable, or other secular arm, and had to rely on its own inherent powers, its own powers to deal with the church privileges of its lay members, and with the church functions of its ecclesiastical officers and ministers. The ecclesiastical coercions were, in the case of a layman, suspension ab ingressu ecclesiæ, of a clerk suspension ab officio and a beneficio, to be followed, if necessary, in both cases by the ultimate coercion of excommunication. I leave out

deprivation and degradation, because I conceive them not to be so much coercions as final and irreversible sentences pronounced on offenders to whom no hope of restoration was left. It is to be noted here that suspension ab ingressu in the case of a clerk in truth necessarily involved suspension ab officio, for how could a clerk so suspended perform his office; and it is due only to the extreme and anomalous mildness and patience of the ecclesiastical procedure, that supension ab officio was not always followed by its logical consequence of suspension from the benefice which constituted the emoluments of the office. Excommunication, of course, was a disqualification for the performance of any ecclesiastical function. It was ecclesiastical outlawry, and to a great extent civil outlawry, and by the common law involved imprisonment until absolution. I cannot conceive it possible that a clerk so outlawed would be permitted to exercise any function or receive any emolument in his church. And it is to be observed that it was only after this extreme coercion of excommunication had been resorted to that the secular power in any way, directly or indirectly, lent is aid to enforce the process or orders of the Court Christain.

It appears to me to be made out clearly that the Court Christian had power to enforce its process or orders by its own means; and that to enforce obedience to any legal order, or to punish disobedience, or any other act of contempt or contumacy, in any suit at any stage, and as against any and every party or person whomsoever lawfully before it, it could use the whole or any part of its armoury of coercions according to its judicial view of the nature and exigency of the case, subject, of course, to appeal, which in their system was a suspensive appeal.

I derive this conclusion, it is true, more from authority than from what we call authorities. The wise saws of the ancient sages of the law are not illustrated by many modern instances. But how could many instances be found? A man must be very perversely obstinate, or very conscientiously prepared for martyrdom, who would disobey the order of an irresistible power, the consequence of disobedience being certain and condign punishment. It is certain that the disobedience to a prohibition would entail the punishment of contempt of the Court prohibiting. But how many instances are there to be found of archbishops, bishops,

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or ecclesiastical judges attached for disobedience to a prohibition? Nor can I find a trace of any new suit having ever been instituted to enforce obedience or punish disobedience to a judicial order in another suit.

I will add to this that to me, on a question of what is ecclesiastical law or right ecclesiastical procedure, the decisions of the Queen in Council are absolutely conclusive and binding—as conclusive and binding as a decision of the same Queen in Council would be as to any matter of Canadian or other colonial law. It is the decision of the ultimate Court of Appeal in such matters. And I answer, therefore, the first of the two questions which I proposed to myself as follows: The order complained of was an order in the suit of *Martin* v. *Mackonochie* (1) warranted by the established law and practice ecclesiastical.

But of course there remains the second question, whether such ecclesiastical law or procedure is forbidden by statute, or inconsistent with any principle of the English general law. I confess that it seemed to me, at first, that there was great difficulty in holding such law and practice, as applied to this case, to be in accordance with the statute and common law.

The acts complained of are not only ecclesiastical offences, but statutory misdemeanours, which by law may be dealt with in either the spiritual or temporal Court, but with this careful provision that the offender may plead his conviction in the one as a bar to proceedings in the other. But if an offence repeated after a monition can be dealt with as a contempt of Court, and visited as a contempt with the penal consequences due to the ecclesiastical offence, then, as in point of law and technically he is not punished for the offence, but for the contempt, he may be proceeded against for the very same acts, either in the court of his bishop or the court of common law.

It would seem, moreover, to be inconvenient and unreasonable if, where in addition to the positive law, there is a judicial monition to obey that law extending over a man's whole life, he could be brought up from any part of the province at any distance of time to answer a charge of disregard of the monition, without any of the safeguards and protections which are thrown around the

(1) Law Rep. 3 P. C. 52, 409.

clerk when he is charged with the breach of the law itself. And this not only in case of acts so clearly defined and so easily ascertained as in the present case, but of monitions against drunkenness, brawling, incontinence, or other immorality, or against heresy, or false teaching, or the like.

But the answer to all that is in my judgement, to be found in what I have already stated, that what the Court is dealing with is judicial contempt and not the offence; that if the judicial contempt had occurred in any other suit, civil or criminal, it might have been dealt with in exactly the same way, and that the contumacious person *cannot be heard to allege* the character of his own misconduct as giving him impunity in respect of the contempt. Moreover, the suggestion that he might be in effect liable to be punished twice for the same matters, is, in my opinion, a suggestion of too remote a possibility to be of any practical effect. It is quite clear that any Court or judge dealing with the misdemeanour, whether it were a common law or ecclesiastical offence, would take into consideration the punishment inflicted for the contempt, as a Criminal Court would take into consideration in a conviction for an assault on a process server what the Civil Court had done by way of punishment for the contempt. And the other suggestion that it might be kept over a man's head all his lifetime seems to me sufficiently answered by this, that a judge, whether of the High Court or the Court Christian, may be trusted, and must be trusted, that he will not allow the process of contempt to be used vexatiously or oppressively, and that the proper Court of Appeal may be trusted, and must be trusted, to control any such use of it. And, on the other hand, there is scarcely any act which a clerk is ordered to do or to abstain from doing which is not in itself an ecclesiastical offence, and if it were to be held that after his disobedience the whole machinery of application to the bishop, the commission, letters of request, and formal trial were to be gone through, then there never could be any enforceable order of the Court of Arches.

I can see no distinction in this respect between the declaring the disobedient clerk contumacious and suspending him, and declaring him contumacious and issuing a significavit, to be followed by a writ de contumace capiendo. And it would seem

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hardly consistent with any jurisprudence or any system of law that a legal order of a competent tribunal is to be disobeyed with impunity or only to be enforced by a new suit, and then another suit, and so on ad infinitum.

It is further to be borne in mind that no one is obliged to accept either office or benefice in the Church. A man who becomes a solicitor of the Court knows that he is liable summarily to be deprived of his office and sole livelihood. A man who enters the army knows that he is liable to be summarily dismissed. So a man who accepts an office and benefice in the Church knows that he is liable to be dealt with in respect of such office and benefice by his ecclesiastical superiors and their judges according to the established law and practice of the Courts Christian, and he cannot be heard to complain to the lay court of anything which is done to him according to such established law and practice. He is in the same position as a Wesleyan minister who is deprived in accordance with the law and constitution of that body.

I ought not to pass over a matter which for a long time appeared to me a great difficulty in the case, viz., that the suspension appears to be a punishment for the offence as well as for the contempt. But I have arrived at the conclusion that it is not really so; that Mr. Mackonochie was distinctly and clearly brought before the Court for the contumacy and punished for the contumacy, the character and dates of the acts being only referred to to shew the nature and persistency of the perverse disobedience. The application to the Court was as follows:—"That it may be declared by the Court that the Rev. A. H. Mackonochie has not obeyed the monition, and also the further monition in the particulars hereinbefore set forth, and will further ask that the monitions may be enforced as to the Court may seem meet, and that the Court may take such further or other steps in the matter as justice may require, and that the Rev. A. H. Mackonochie may be condemned in the costs of these proceedings."

This was the application of which Mr. Mackonochie had notice, and it was this on which the judge proceeded.

I cannot help adding this, that except to the parties immediately concerned and their partisans, the whole matter seems to me of little

practical moment. If the order of the Queen's Bench Division were affirmed the only result would, I should imagine, be that in any future case the Court would take care that its decisions should not be contemned with impunity. The sentence would be postponed to give the offender an opportunity of escaping with a light or nominal punishment, on shewing his actual conformity to the law and promising due obedience for the future, or a sentence would be passed actually suspending the offending clerk quousque, that is to say, until he should have expressed to the Court and his ordinary his contrition for the past, and his solemn promise as a Christian minister to be canonically obedient for the future. And this is practically what has been done here, for I cannot doubt that on application, accompanied by such expression and promise, the suspension could and would be relaxed.

In the result I give my voice for the appellants, and am of opinion that the order of the Queen's Bench Division should be reversed, with the usual consequences as to costs in the Court below and in this Court.

LORD COLERIDGE, C.J. It is necessary in this case to set forth the exact state of the facts upon which the suspension questioned by Mr. Mackonochie was decreed by Lord Penzance, because important as the case in some respects is, and great as may be the interest, in some minds at least, which the discussions upon it have excited, the decision of it turns upon the exact state of facts existing when the suspension issued and the exact legal forms with which its issuing was accompanied. I believe no member of the court doubts that Mr. Mackonochie might have been quite rightly subjected to the sentence which is questioned, if the acts of which he is accused had been proved against him in a properly constituted suit, and by proper evidence.

There was such a suit brought before Sir Robert Phillimore, then Dean of the Arches, by letters of request from the Bishop of London, in 1874. In that suit he was pronounced guilty of having done certain acts in the celebration of divine worship which were ecclesiastical offences, was suspended ab officio for six weeks and admonished to abstain for the future from doing those specified acts. In June, 1875 (an appeal to the Privy Council which was

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abandoned, accounting for the delay), Mr. Mackonochie's suspension was published, and the monition was served upon him. In March, 1878, notice was given him that it was alleged he had disobeyed the monition and repeated the forbidden acts, and that application would be made to the Court of Arches to enforce the monition as to the Court might seem meet. He did not appear before the Court upon the hearing, which took place on this notice. A second monition was issued on the 29th of March, 1878, by Lord Penzance, who had succeeded Sir Robert Phillimore as Dean of the Arches, declaring that Mr. Mackonochie had not obeyed the first monition, and further admonishing him to abstain for the future from the specified acts. On the 20th of April, 1878, he had a further notice, stating that he had repeated the forbidden acts subsequently to the last monition, i.e. on the 31st of March and 7th of April, 1878, and that the Court was to be asked on the 11th of May to enforce its monitions, as to it might seem meet. Copies of the affidavits in support of the allegation that he had repeated the forbidden acts, and generally in support of the application, were served with the notice. Mr. Mackonochie did not appear, and Lord Penzance, after reading the affidavits, and reserving judgment, finally decided that Mr. Mackonochie had disobeyed and contravened the monitions of the Court, decreed him to be suspended ab officio et beneficio for three years, and condemned him in costs. The majority of the Queen's Bench Division have granted a prohibition against this sentence, and the question before us is whether this prohibition is right.

Mr. Mackonochie is a clerk in holy orders; he has been charged before an Ecclesiastical Court with having committed a series of ecclesiastical offences, and the Court has passed a sentence on him for these offences, which, under certain circumstances, it was competent to pass. I express no opinion, and I have formed none, whether Mr. Mackonochie has or has not in fact defied the law. But if he or any other clergyman has deliberately refused obedience to the law of the Established Church, no lawyer can desire that he should go unpunished, or wish to be astute to preserve him in an office which he uses to defeat some of the chief objects for which the office was created. We have here, therefore, a person, an offence, and a punishment, all within the jurisdiction of the

Ecclesiastical Court. It follows that the Ecclesiastical Court ought not to be prohibited, unless in the course of its proceedings it has done, or attempted to do, "something manifestly out of its jurisdiction, or contrary to the law of the land." I use the words of Littledale, J., delivering the judgment of the Court in *Ex parte Smyth* (1) expressly approved of and adopted by Lord Wensleydale in *Ex parte Story*. (2) If it has done or attempted to do either, then undoubtedly prohibition ought to go.

Three questions at least appear to me to arise, and to require solution in order to arrive at a decision in this case.

1. Is there still existing and depending in the Ecclesiastical Court a suit, in which the last monition, and the suspension consequent upon disobedience to it, can be regarded as a step or proceeding; or was this monition a fresh proceeding to correct, and the consequent suspension a punishment inflicted for, a fresh offence? Or, perhaps, this question may be also put thus: Is this alleged conduct of Mr. Mackonochie, though capable of being treated as a fresh ecclesiastical offence, also a contempt of the continuing order of the Court, and liable therefore to be punished as contempt or contumacy?

2. Next, assuming that it is a contempt and may be so treated, can contempt or contumacy, by the established law and practice of the Ecclesiastical Courts, be punished by suspension on summary process?

3. Supposing contempt or contumacy cannot be so punished according to the established law and practice of the Ecclesiastical Court, is the awarding of such a punishment to it an excess of jurisdiction, or an error in procedure only, corrigible upon appeal, and not ground for prohibition? I will endeavour, as shortly as I can, to consider these questions in their order; though, in considering them, no doubt a number of other questions immediately arise and must be discussed.

Now upon the first hearing and determination of the case by Sir Robert Phillimore, in 1874, he undoubtedly appended to, or made part of his sentence of suspension (I do not think it material which form of words is used), a monition to Mr. Mackonochie to abstain for the future from the practices for which he was

(1) 3 A. & E. 719. (2) 8 Ex. 201.

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condemned and punished. What is the effect of this monition? Does it keep the suit alive for ever; or, at any rate, is it an order the duration of the force of which is indefinite, and disobedience to which is punishable in some shape by the Court, as long as the man lives upon whom it has been made?

No doubt the word "monition" in ecclesiastical procedure has various senses; and, in the whole discussion to which this word and this question give rise, it is important never to forget the peculiar character of the Court Christian—to use old language—the objects for which it existed and the purposes which, if it did its duty, it endeavoured to effect. It existed for the reformation of manners: and its object was the soul's health. Ecclesiasticæ jurisdictionis exercendæ nervi sunt pœnæ et censuræ ecclesiasticæ, says Oughton, tit. cxxxvii. note, a 1, and in the language of the canonists there is a distinction to be observed between pœnæ and censuræ. In the Bibliotheca of Ferraris in the articles Censura and Pœna this distinction will be found carefully made. A censure, as I understand him, is something imposed or prohibited for the purpose of improving the subject of the sentence for the future—punishments or pœnæ are like a civil or criminal fine or punishment: "Contra incorrigibiles a Jure canonico statutæ." Censures are three: suspension, excommunication, and interdict; punishments are various, but they include suspension, deposition or deprivation, and degradation. Suspension may be either a censure or a punishment; if a censure it must be preceded by monition, but not so if a punishment. "Suspensio enim ubi est censura requirit omnino monitiones; ubi est pœna eas minime requirit."—Ferraris Suspensio. This also is the result as it seems to me of much elaborate and minute disquisition to be seen, if any one cares to study the subject, in Van Espen, part iii. tit. xi. caps. 3 and 7 of his Jus Ecclesiasticum; and also in the second and third chapters of his Tractatus Historico-Canonicus de Censuris Ecclesiasticis, which, though chiefly occupied with the subject of excommunication, yet when it uses general language is to be taken, I apprehend, as using it with respect to all ecclesiastical censures. It is so laid down also in Gibson, 1047, quoting two paragraphs, which I am unable to verify, according to his citation, from the Extravagants, in one of which there is the

statement that upon some offences suspension follows ipso facto. (1) Monitions come under the head neither of censures nor of punishments, as far as I know, in the old canonists. In the days of Hostiensis and De Burgo, and even in the days of Barbosa and Van Espen, a monition was, what the very word implies, a warning to an offender that, if he did not reform his manners or cease his offence, the Church would visit him with censure. The trine monition, so often spoken of as founded upon Scripture, and as a condition precedent to the legality of certain censures, had this moral object, and was in accordance with the at least professedly moral character of the tribunals which issued it. No doubt the word now means something different; but I think the original meaning of the word, and the thing which it originally signified, should be steadily borne in mind. Indeed, I must repeat, at the risk of being wearisome, that the character of the Courts, and their objects, are in my mind cardinal to a right judgment on their procedure. So far as this procedure has been altered by or is subject to Acts of Parliament, the Acts must of course be construed like any other Act; but so far as it has not, analogies drawn from the procedure of ordinary civil courts, and even still more from ordinary criminal courts, are sure I think to be misleading.

Monitions, then, giving an opportunity for repentance and amendment forewent originally sentences whether of censure or punishment, and were in many cases essential to their validity. Somewhat departing from its original sense, but yet with some of its original sense still preserved in it, the word came to mean steps in procedure, process in fact in the course of a suit. A monition issues to compel appearance, to produce a document, to file an answer, to undergo examination and cross-examination, and so forth. These monitions are described as instruments adopted by the Ecclesiastical Courts which require an act to be done: 3 Burn 191, ed. 1842. They order the act to be done, speaking

(1) Since the delivery of this judgment I have been informed by Mr. Droop that Gibson as well as Lyndwood cites as "Extra" the Decretal of Gregory; and in that Decretal I have since found and verified the passages. Gibson's inaccuracy is well known to those who have had much to do with his book, but in this instance it was my own knowledge and not his accuracy which was in fault.—C.

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generally, "under pain of law and contempt thereof," and they are, what they purport to be, not sentences, or censures, or punishments, but orders of the Court to be obeyed, and if they are obeyed (I shall consider by-and-by what is the consequence of disobedience), their force is over, and, like any other orders which have served their purpose, they are at an end.

Then there is another kind of monition, forming part of or appended to a sentence, when the sentence itself inflicts a censure or a punishment. In these the form is the same; the person against whom the monition is directed is monished or warned to do or not to do something on pain of the law and contempt thereof; and this kind of monition requires to be more fully examined. First, this sort of monition does not appear to me to be correctly described as part of the censure or punishment. It is said, indeed, and by persons entitled to the utmost respect, that a monition is in itself sometimes a censure or a punishment. I venture, with great deference, to doubt this. Admonition is certainly spoken of as a punishment in the Report of the Ecclesiastical Commissioners in 1832, p. 54, and elsewhere, to which so much authority is not unjustly attributed. And in Mr. Coote's Practice of the Ecclesiastical Courts, pp. 110 and 197, monition is classed amongst censures or punishments. And it is so spoken of by Sir Robert Phillimore, professing in this matter to do no more than follow the writers who had preceded him. As to the report, without staying to discuss the authority of its statements in a court of law, it is enough to say that, if the passage I have referred to be looked at, it will be clear that the commissioners are not affecting to speak with technical accuracy, and are using general or popular language. Nor do I at all question that, for purposes of popular intelligence, a man who is monished not to do what he has been doing, or to do what he has not been doing, and to pay costs (which is the almost universal addition to such a sentence), may very well be said, in popular language, to be censured or punished.

In Mr. Coote's book he places monition as the appropriate censure against four of the more ordinary offences for which clergymen are subjected to proceedings before an ecclesiastical judge. The cases cited respectively in support of the assertion

that monition is the appropriate *censure* in these four cases, are *Gates* v. *Chambers* (1); *Smith* v. *Lovegrove* (2); *Hodgson* v. *Dillon* (3); *Taylor* v. *Morley*. (4) In neither of these cases is there a word in the sentence as to censure or punishment. The sentence in three of them is a warning not to repeat conduct which has been ascertained to be illegal by the sentence itself. In *Gates* v. *Chambers* (1) there was no sentence at all, and Sir John Nicholl absolved the defendant from all kind of moral blame. In *Taylor* v. *Morley* (4) Sir Herbert Jenner expressly declines to inflict any punishment. The other two were cases of bonâ fide dispute as to the necessity for licences. None of them justify the use which Mr. Coote has made of them. Nor does Oughton bear him out; Oughton, who is cited as "a great authority," and called one of the two "oracles of our own practice" (Godolphin being the other), by Lord Stowell in *Biggs* v. *Morgan* (5) —Oughton says that the things "quæ tam ecclesiasticis quam laicis possunt *infligi*, sunt monitio, quæ *præparatoria* est, plerumque *præcedens ecclesiasticas censuras*" (vol. i. p. 213, ed. 1738), language, as I think, expressly and pointedly excluding and distinguishing monitions from those censures which it prepares for and precedes. In the cases I have been able to refer to, which end in mere monition, there was almost always some real dispute; and the judges who decided them appear to have thought that making the defendant, who was in the wrong in the dispute, pay the whole or (sometimes) a portion only of the costs, was punishment enough; and to have abstained of set purpose from anything which could be called in ecclesiastical law either punishment or censure. I have protested against analogies from our criminal law, as likely to mislead; but I am nevertheless tempted to ask whether, in any book of practice, or even in popular language, the setting a man free on his own recognizance to come up for judgment, if ever it should be required, has ever been called either a punishment or a censure?

What, then, is the true character of the monition which we have here to consider, not professing to be itself the sentence, but

(1) 2 Add. 177.
(2) 2 Lee, 162.
(3) 2 Curt. 388.
(4) 1 Curt. 470.
(5) 3 Phillim. 329.

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appended to the sentence, and at least in terms and apparently containing the orders of the Court, after the punishment inflicted by it has been fully undergone? It must be borne in mind that the Courts Christian, and they only, administered the procedure by which the Church conducted in public the discipline of its members. No one can read a treatise on ecclesiastical law without perceiving that the Courts owe their origin to the claim of the Church to regulate the life of those belonging to it, and to enforce upon them the moral and religious obligations resulting from their profession. The most perfunctory glance at the Prolegomena of Van Espen, at the Preface of Thomassinus or Thomassin, at the early chapters of the Institutiones Canonicæ of Devotus (especially the 3rd section), or indeed at any other writer of authority on canon law, will shew us that the law professed to be founded on Scripture, to be as the very word signifies, a rule of life, and that the bishops and other Church authorities professed to enforce it for moral and religious objects, and originally by sentences of moral and religious obligation only, which appealed entirely to the heart and conscience. Originally no Court Christian could inflict any temporal punishment. In principle, therefore, there is nothing to surprise us that a Church Court should proceed, after warning, to pass a sentence of censure or of punishment for something declared upon authority to be a breach of the Church law, and should add to its sentence an order to the party not to repeat conduct which had been declared to be wrong. Once admit (which I think cannot seriously be disputed), that Church Courts are, according to their idea, not courts for settling temporal disputes between man and man, but organs of the Church for enforcing discipline, and it follows at once that the power to make such orders as we have before us here, to do or to abstain from doing something ascertained respectively to be right or wrong, is part of their very essence, and that without such power their use in many cases would be gone. Take, for example, the case of an incestuous marriage, a marriage I will suppose not incestuous only because within some of the more remote prohibited degrees, but because the sense of modern civilised mankind would universally recoil from it; say of a brother and a sister. Before Lord Lyndhurst's Act, I believe,

such a marriage was voidable only by the decree of an Ecclesiastical Court. Suppose a suit to avoid it, and the marriage avoided, and suppose further some penance enjoined, and (what was done with great particularity by Lord Stowell in *Burgess* v. *Burgess* (1)), an order made to cease for the future from the incestuous cohabitation, to prevent and to put an end to which, and not merely to punish which, was the very object of the suit. If I have rightly understood the arguments of Mr. Charles and Dr. Phillimore, when the penance had been performed, the cohabitation could be resumed with perfect impunity as far as the Court is concerned; the Court could be defied; and the only means any one could take, who wished to put an end to the abomination, would be a series of fresh suits from time to time, till the patience, or the purse, of the sinners was exhausted. Bearing in mind the object and the character of the Court, such a contention appears to me absolutely inconsistent with them. If an Act of Parliament said so, and if there were decisions of authority which established such a state of things, I could only submit to them; but it would require an Act of Parliament, or a decision direct in point, and binding on me judicially, to make me do so.

Nor from the point of view which I am endeavouring steadily to keep to (viz., the church or ecclesiastical), is the consequence one whit less inconvenient or less inconsistent with the very character of the Court if the present prohibition is upheld. The question in the case before us in the Church Court was a question of ritual, whether certain acts were or were not permissible by the law of the Established Church in the most solemn ceremony of Christian worship. Ritual in itself may be, no doubt sometimes is, a matter of great indifference, or the difference respecting it may go no deeper than a difference of taste. But it may be made to symbolise, and even to express, doctrines or practices of the utmost practical importance. The ritual acts done by Mr. Mackonochie were of the latter sort. They were done, and they were avowed by him to be done, as symbols or expressions of doctrines and practices, which very large numbers of the members of the Established Church (I do not know, and I therefore do not

(1) 1 Cons. 393.

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express any opinion which way the absolute majority inclines; but at any rate which large numbers) regard as abject and mischievous superstition. Many persons wish to prevent, if possible, practices which they so regard from receiving the sanction of law within, and becoming part of the legal ceremonial of, the national church of this country established and maintained by law. The highest Ecclesiastical Court in the country had deliberately determined the acts to be unlawful, whatever they signified. But Mr. Mackonochie repeated the acts and steadily defied the law. He was told authoritatively what the law was by the Dean of the Arches; he was punished lightly for disobeying it; but he was told that he must not repeat his acts of disobedience. If in matter of fact, there has ever existed a practice in the Courts Christian to append to their sentences monitions such as the monition here, capable of being enforced, as it is proposed to enforce this, it is surely a practice which it is desirable, if it be lawful, to uphold.

And if in any case it is desirable, surely it is in this case. If it cannot be upheld, it is hardly extravagant to say that, unless in every case the extremest sentence warranted by law is to be passed in the first instance, the discipline of the Church, so far as it depends upon its Courts, is practically at an end. The strong and sensible observations of Lord Stowell in *Mr. Stone's Case* (1), were indeed made in a case of doctrine; but they are to the full as true in a case of ritual practices, whether these ritual practices are or are not performed for the sake of the doctrine which they express. "That any clergyman," say Lord Stowell, "should assume the liberty of inculcating his own private opinions, in direct opposition to the doctrines of the Established Church, in a place set apart for its own public worship, is not more contrary to the nature of a national church, than to all honest and rational conduct . . . . It would be a gross contradiction of its fundamental purpose to say that it is liable to the reproach of persecution, if it does not pay its ministers for maintaining doctrines contrary to its own." The right and appropriate mode of dealing with a man who will not conform to the rules of the society to which he belongs, and from which he derives his status and his pay, is to remove him from the place he holds in it; and

(1) 1 Cons. 428, 429.

probably a person so removed would command no public sympathy in his removal. Here it is said that the right and appropriate punishment (if there is any, which is disputed), would have been by significavit and imprisonment; but as this is a punishment for obvious reasons in many cases impossible to enforce, though the form of words varies, it is in sense and substance the same thing as saying, that there is no right and appropriate punishment at all. Unless a man is to be sent to prison for disobedience, there are, if Mr. Charles and Dr. Phillimore be right (and if I understand my Brother Brett, he thinks that they *are* right), no means of enforcing obedience in matters of ritual, however important, except the making every particular act or set of acts of alleged ritual irregularity, the subject of separate and distinct suits in court; and as the exception is practically absurd, there are, in fact according to this argument, no means. So that in the case of the setting-up of an idolatrous image, or the conducting an idolatrous procession, a clerk cannot be compelled to take down one or discontinue the other, after he has undergone his sentence, without in every case a fresh suit with all its formalities; a conclusion which the sincere respect I entertain for those who have arrived at it, alone prevents me from describing as I think it deserves.

But after all, this may be so; and it may be said with much truth, that all I have been saying, admitting it to be all true, comes to no more than this, that, from a certain point of view and for certain purposes, the procedure adopted by Sir Robert Phillimore and Lord Penzance is at all events, desirable; and that it does not shew that it is lawful, or has been authorized. No doubt it does not. And there are objections, said to be formidable, to what has been done.

It has been questioned whether there is any right to append an order purporting to affect future conduct to the definitive sentence in a suit; and whether if it is appended it has any legal force. As to the fact, it has been done too often for me to entertain the slightest doubt that it is part of the established and recognised procedure of the Ecclesiastical Courts. It has been done in times comparatively modern by Dr. Lushington, by Sir Herbert Jenner, by Sir John Nicholl, by Lord Stowell. It has been done in times

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more ancient, as many of the precedents cited to us from the return of Mr. Rothery demonstrate. I agree in thinking that some of these latter cases are open to, and for myself I concur in, the disparaging remarks which have been made upon them. I think them, however, strong to shew that the practice existed; whether these cases are good and just examples of it is another matter. Then if the practice existed, was it a practice to append to sentences orders which seemed on the face of them to direct future conduct, which yet had and were intended and known to have no such power? It is to me incredible, I say so with true respect and deference for at least one great authority, who has come to an opposite conclusion, that Lord Stowell and Sir John Nicholl, for example, would have given the precise and definite directions they did for future conduct in the cases of *Burgess* v. *Burgess* (1) and *Blackmore* v. *Rider* (2), and Sir Herbert Jenner in *Burder* v. *Langley* (3) and *Newbery* v. *Goodwin* (4), if these directions were of no legal force or validity; if all that these judges intended was, to give notice that in case of disobedience; and in case of a fresh suit for fresh acts of disobedience, *not otherwise;* and, of course, in case they happened respectively to be the judges trying the fresh suits; the punishment to be awarded in those fresh suits would be or might be much heavier on the offenders. Such does not, I will own, appear to me the fair and reasonable construction of the language used by those judges; there is nothing in their language to shew that they were making anything but ordinary and every-day decrees; and they seem to me to be witnesses who prove conclusively the constant prevalence in these courts of a practice, the very existence of which is disputed. I answer, therefore, my first question thus: whether the suit in which the monition before us was issued is kept alive by the monition or not I will not take upon me to determine; but I think there is abundance of authority to shew that the Courts Christian have, as far back as evidence reaches, asserted a jurisdiction over the future conduct of parties in a suit before them, where the conduct of those parties has been the subject of the suit; and as I think this assertion a perfectly natural one for the Court Christian to make, so I do

(1) 1 Cons. 384.
(2) 2 Phillim. 359.
(3) 1 Notes of Cas. 552.
(4) 1 Phillim. 282.

not believe that it was, or was ever intended to be, merely verbal and incapable of being enforced in act.

II. Then arises the second question, assuming that the course and practice of the Courts Christian do warrant the appending of a monition to a definitive sentence, can disobedience to such a monition be punished either at all, or, at any rate, by suspension? It is said, and as the assertion has not been controverted at the bar, and I have no knowledge of my own which enables me to controvert it, I must take it to be true (subject to an observation on the case of *Bishop of Lincoln* v. *Day* (1)), that there is no recorded instance, till quite in recent time, of any one being brought summarily before the Court after the conclusion of a suit, and being punished for disobedience to this kind of monition. There are, no doubt, abundant instances of punishment for disobedience to monitions in the nature of process in the course of a suit; and for disobedience to monitions at the end of a civil suit, and forming part of a sentence ordering some specific act to be done; as, for example, payment of costs, or in a testamentary suit, the exhibiting of an inventory or an account. But it is agreed that such instances as these latter are not to the point; and it is said, and I will for the present so take it, that there are no instances which are.

Now I confess I am not so much impressed as others no doubt are by this absence of instances. Till the beginning of the present century there are, with the exception of Sir George Lee's two volumes, no regular ecclesiastical reports. The abstracts of cases furnished by Mr. Rothery's Return take us a good deal further back, and there are occasional indeed not infrequent notices of the practice of the Ecclesiastical Courts in our own old reports and digests, where the subject is prohibition. But Mr. Rothery's Return is only of cases which were appealed to the Delegates; of these, seven only even remotely, as Mr. Rothery informs us, involved any question of doctrine or ritual, and if those seven be looked at there is not a single one which from its circumstances could give occasion, as in fact none did give occasion, to such a sentence as the one before us. But further if our ecclesiastical records had been as rich as they are poor, it

(1) 1 Rob. 724.

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would not be the majority of cases in which we should expect to find these monitions. Further, as a rule, monitions are obeyed; in this country men are wont to submit to the law as declared by the Courts: and in these tolerant days it is only, I think, amongst the clergy of the Established Church that persons are to be found who disobey the law on principle, and claim credit for their disobedience as a virtue. I should not, therefore, expect to find many instances recorded of resistance to the orders of monitions, nor by consequence of proceedings taken, to punish or overcome such resistance.

There is, however, one such case at least, on which it is fit to say a word, because its exact import has been, I think, a little misconstrued by a great lawyer, generally most accurate in his account of the cases which he cites or examines. It is the case of *Bishop of Lincoln* v. *Day*. (1) It has been said that this is a case shewing clearly that there was no instance of deprivation for contumacy or contempt. But if the case is looked at it will be seen this is not so. Deprivation was prayed by counsel for the *original offence*, that of drunkenness, and Sir Herbert Jenner, saying that the *case*, not the *contempt*, was "most aggravated," declined to deprive for it, as there was no precedent for inflicting such a punishment on such an offence, i.e., drunkenness. The defendant was suspended ab officio et beneficio for three years; he underwent his full sentence, and some months after, on resuming his functions without a certificate of good conduct, during *the* three years of suspension, he was pronounced in contempt upon monition, and his contempt was signified. If the defendant had misconducted himself during *the* three years of suspension, he could never have obtained the certificate, and the principle of his case is, that at any time during his whole life, though he had undergone his punishment, the sentence would have been sufficiently alive to bring him under the penalties of contempt (whatever those penalties were) if he disobeyed its order. I do not think it an answer to say, that as the sentence was actual suspension for three years, and then further *until* he produced a certificate of good conduct, the sentence was a continuing one of suspension. Sir Herbert Jenner clearly did not think so. He refused to deprive, which is but

(1) 1 Rob. 724.

another word for perpetual suspension. And if it be said that the clerk by his own act turned a temporary sentence into a perpetual one, then it must be admitted that by acts *done subsequent to the sentence* the power of the Court is enlarged, and a sentence of one kind can, by a reservation made in it, or an addition made to it, after it has been pronounced, be changed into a sentence of another kind. But substantially that is the very thing which has been done in the case before us. The same thing had been done and was upheld by the Queen's Bench in *Reg.* v. *Bishop of Oxford* (1), in which one of the judges, not ignorant of ecclesiastical law, draws a pointed distinction between sentences in pœnam and sentences for reformation, a distinction which the arguments in favour of the prohibition altogether overlook, though a very slight acquaintance with the elements of ecclesiastical law would ascertain its existence and importance. I conclude, therefore, both on reason and on authority, that such a monition as we are concerned with is a perfectly lawful act in a Court Christian, and that disobedience to it may, in some form or other, be punished.

But then in what form? May it be by suspension? This is the next question, and one of the most important. Now, first, I am unable to see that this is or can be anything but a question of procedure in the strictest sense. It has been admitted from the beginning that this punishment might be inflicted on this defendant for this very offence charged against him, as the result of a fresh suit. It is not said that the punishment is inappropriate to or excessive for the offence as an offence; nor that Mr. Mackonochie had not the fullest notice; nor that he was deprived of any real or substantial advantage by the course pursued. I pass by, with the observation that it is the purest petitio principii, the argument that Mr. Mackonochie had no notice in fact, because he had no notice which he was bound to treat as one. He elected not to appear, and to take the consequences, whatever they might be. Still it is said that these consequences were, at the worst, imprisonment and not suspension, and therefore there should be prohibition. I will give my reasons presently for thinking that assuming the premiss the conclusion does not follow; but I will first examine the premiss. I will assume that there are no

(1) 21 L. J. (Q.B.) 339.

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recorded cases, except the cases of *Martin* v. *Mackonochie* (1) and *Hebbert* v. *Purchas* (2) before the Privy Council, in which a clerk has been suspended for disobedience to a monition appended to a sentence delivered in a regularly instituted and prosecuted suit. This would not, I apprehend, be *of itself* sufficient to shew that the proceeding was unwarranted. Instances only of resistance to such a power as this, would be recorded in the books; and that, under circumstances which I need not repeat, no instance has been found of a recorded resistance to the power, does not at all shew that the power has not been exercised. The two cases in the Privy Council are said not to be sufficient to shew that it is warranted; and the inquiry therefore, I presume, becomes one in which principle is to be considered, and not authority. The principle supposed to be violated by the proceeding is this: that as deprivation of a clerk cannot take place, except with all the formalities of a plenary suit, and as suspension is temporary deprivation, it cannot be inflicted according to the course and practice of the Court Christian, as the result of a summary proceeding. Now the proceeding here was summary; and therefore one of the main principles according to which ecclesiastical jurisdiction is exercised has been, it is said, violated.

It was certainly to my mind very surprising to hear that a censure or punishment applicable to clerks only could not be applied to clerks when they disobey the orders of the Church Courts. But in a subject-matter, with which I have no pretence to be familiar, this is nothing. It has, however, led me to look carefully into the supposed authorities on which the proposition is based. In my opinion the proposition is absolutely baseless; though I must observe that out of the voluminous writers on ecclesiastical law ancient and modern, it is not difficult to find isolated passages, right in their context, intelligible to the ecclesiastical lawyers and judges for whom they were written; but likely, unless a great deal more than the passages themselves is read and considered, to mislead a man not familiar with the subject, and convey to him an entirely false impression.

I do not think it necessary to examine at any length the argument founded upon the passage in Conset, part i. s. 2; because

(1) Law Rep. 3 P. C. 52. (2) Law Rep. 4 P. C. 301.

I do not at all doubt that if this is a *cause* in the sense in which that word is used by Conset, the whole proceeding is absolutely void, as violating the provisions of the Church Discipline Act, (3 & 4 Vict. c. 86). But then it is said that if it is not a fresh cause and fresh proceeding, and therefore void (as I agree in that case it would be), by virtue of the last mentioned statute, it is a proceeding against a clerk for contumacy, and that for contumacy suspension is not a lawful punishment. I am not of that opinion. In the first place suspension eo nomine is in canons and books of authority awarded as a censure or punishment for disobedience to authority, contempt, or contumacy. It is so in Lyndwood, p. 39. I do not forget the gloss upon this passage referred to by Mr. Charles, to which I will return. It is so in the 68th and the 122nd of the canons of 1604. It is so in numerous instances (I have myself counted above twenty) in the single collection of Johnson's English Canons, ranging from the Conquest to 1463. It is so in the 44th section of the Appendix to Godolphin, as to which I do not forget and will recur to Mr. Charles's observations. It is so in a constitution of Othobon, which may be found either in Gibson 209, or in the second part of Lyndwood, 111. It will be found also described as a censure in many cases and many forms, in the first chapter of the second title in the first part of Lyndwood, where at pages, 10, 11, 12, the whole subject is discussed at great length and with infinite minuteness. Indeed, I think it is impossible to look even carelessly through any collection of canons, or notes upon them, without being amazed at the statement that suspension in the days of those canons, and of the bishops and judges who had to enforce them, was no appropriate punishment for the contempt or disobedience of a clerk.

But further it is a punishment which has actually been inflicted. I think the case of *Harrison* v. *Archbishop of Dublin* (1) is on this point conclusive, and has the authority of the House of Lords. I am on the single point whether suspension is an appropriate penalty for a *contumacious* clerk. The report shews either that the point now made was not taken by Sir E. Northey and Mr. Lutwyche who argued for the prohibition, which if it could have availed them—remembering their characters and looking at their

(1) 2 Bro. P. C. (2nd ed.) 199.

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argument—I think incredible; or that it was taken (and this is I think the true view to be gathered from page 203), and was distinctly overruled. With great respect for those who differ, I do not think it relevant to the point I am upon to say that the suspension here was in a court of visitation, and as the result of a suit. But in matter of fact I do not think it was the result of a suit; except so far as all discipline conducted by a bishop or a visitor in visitation may be said to be in a court, and the persons visited may be called parties to a legal proceeding. I cannot find an indication in *this* case of a suit. In the earlier case of the *Bishop of Kildare* v. *Archbishop of Dublin* (1), there is at the end of the declaration something which looks like it. I read it as the legal phraseology in which the ordinary proceedings at a visitation are described; but if I am wrong, the language in the later case, *Harrison* v. *Archbishop of Dublin* (2), is very different, and it is possible, though I do not myself believe it, that the Archbishop of Dublin may have treated the Bishop of Kildare, who was the Dean of Christ Church, with more formality than he treated Mr. Harrison; and it is to be observed that it nowhere appears what sentence the archbishop passed, if any, upon the Bishop of Kildare.

The same punishment or rather deprivation which is perpetual suspension was also inflicted in the case of Mr. Morrison, the sentence upon whom, setting out all the proceedings, is given at length by Gibson, p. 1517; but although contumacy was no doubt one of Mr. Morrison's offences, he was guilty also of persistent non-residence, and the sentence of deprivation is expressed to be passed in the interests of his parish. There are cases also in Mr. Rothery's Return which though they may be, probably are, open to comment, at least, as I have before said, bear witness to the existence of the practice.

It has been argued, however, that where the word "suspension" by itself is used in a canon, it is always to be taken as importing suspension ab ingressu ecclesiæ only. It is useless to complain of an argument which was I presume bonâ fide urged, but it is not a little astonishing. The whole foundation for it is a line in a gloss on a canon of Peuham, in the 49th page of the first part of

(1) 2 Bro. P. C. 179. (2) 2 Bro. P. C. (2nd ed.) 199.

Lyndwood, as to the proper supply of oil in baptism, "sub pœnâ suspensionis." The gloss lays down the very good general rule that in penal legislation general words are to be taken in mitiori sensu. And then it says: "Ex quibus *videtur* (no more) quod sententia suspensionis hic *lata* debet intelligi de minus pœnali, scilicet ab ingressu ecclesiæ. Et hoc puto verum, non obstante quod talis, de quali hic dicitur, deponendus esset secundum canones ut prædixi. Et sic sentire videtur J. de Atho in constitutione Othonis." It is not very easy to follow a reference in Lyndwood, but after the best study I can make of it I must say that John of Atho does not appear to me so to think. However this may be, nothing can be slighter and more uncertain than this gloss which is seriously put forward as laying down a general canon of construction for the word suspension. I observe that in a gloss of John of Atho himself, Lyndwood, part ii. p. 13, it is said there are no less than twenty-five different sorts of suspension, each with its sub-divisions; some of these suspensions far more trivial than suspension ab ingressu.

I need not point out the effect of this upon the argument that suspension simpliciter always means suspension ab ingressu ecclesiæ, because the word is to be taken in mitiori sensu. In the same page there is a discussion whether, if suspension a beneficio were not named suspension ab officio would have included it, and it is decided in the *affirmative*. And in a constitution, p. 111, De Oblationibus Capellarum Restituendis Ecclesiæ Matrici, where a man is said in a canon of Otho's "si contempserit vinculo *suspensionis* innodari," the gloss of John de Atho is simply this "*scilicet ab officio*." The same authority also says, in a gloss to the Constitutio de Habitu Clericorum (p. 88), that a different principle is to be applied where suspension is inflicted by the law ipso facto, and where suspension is the sentence of a judge; and the doctrine of the gloss on which so much reliance is placed does not apply in the latter case. Further, though suspension ab ingressu may be, and sometimes is, inflicted on a clerk, it is a punishment in its nature far more appropriate to laymen. So little is it considered a clerical punishment that in the locus classicus in Oughton it is not even mentioned; in a long chapter on Ayliffe on suspension there is no allusion to it; it is not mentioned as a kind of suspension in Calvin's Lexicon;

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it is not mentioned in the chapter in Bingham on clerical punishments (xvii. 1). In Gibson, 1047, where several sorts of suspension are described, suspension ab ingressu is said to relate "to the laity *chiefly*." Godolphin speaks of "suspension ab ingressu ecclesiæ" as "inflicted *upon lay persons* for smaller crimes and contempts" (App. 48); and in the statute against brawling, 5 & 6 Edw. 6, c. 4, s. 1, the ordinary is *for the same offence* to suspend the offender if *he be a layman* ab ingressu ecclesiæ, if *he be a clerk* from the ministration of his office. Probably this disposes of the proposition, founded only on a misunderstood fragment of a gloss upon two words in a single canon in Lyndwood, that suspension always means, in canons applicable to clerks, suspension ab ingressu ecclesiæ, a sort of suspension which very rarely applies to them at all, and is not even mentioned in great and learned works which treat of punishments peculiar to them. Yet this astonishing proposition was apparently with perfect seriousness pressed upon the Court, and I must say that it is one of the inconveniences which follows the using of these Courts as in the nature of Courts of Appeal from the Courts Christian, that scraps of voluminous and indigested writers, necessarily unfamiliar to counsel, are cited to a Court also necessarily unfamiliar with them, and that it necessarily takes an amount of time and trouble wholly incommensurate with the result to shew their entire irrelevancy.

I will say only as to the authority of the appendix to Godolphin that I cannot find in any text-book, or in any judgment, any distinction drawn between it and the rest of the book; anything to disentitle it from receiving the deference which is due to a writer called by Lord Stowell "an oracle:" and if the passage has Godolphin's authority, then it is expressly in point in support of the present sentence. For myself, I believe that Godolphin meant it, for in the 27th chapter on Deprivation in the body of his book, in a part of it as to which no question of authenticity can possibly arise, he places "*contempt*" as the second of the three "causes of deprivation," the other two being want of capacity and crime. But deprivation is perpetual suspension, and what is true in principle of the greater must be true of the less. If a clerk may be deprived for contempt, it is to my mind quite impossible to deny that he may be suspended.

There remain to be considered the two cases in the Privy Council, *Martin* v. *Mackonochie* (1) and *Hebbert* v. *Purchas* (2), which the Lord Chief Justice in his judgment most truly states to be binding on Lord Penzance; but which he thinks were wrongly decided, and the authority of which is in his opinion not binding upon the Queen's Bench, nor, à fortiori, upon us. Binding in the sense in which that word is commonly understood in these Courts certainly these cases are not, because the Privy Council is not a Court of Appeal from any part of the Supreme Court. It is agreed, however, that the judgments of the Privy Council are entitled in every English Court to great deference; and I go in this case further, and being prepared to hold, for reasons which I shall presently assign, that this is a question of procedure, I think that the judgments of the highest Ecclesiastical Court in the country as to its own procedure do in a sense, and with some limitations, conclude such a question in every other court in the kingdom. Such certainly appears to have been the opinion of the Court of King's Bench in *Ackerley* v. *Parkinson* (3), when in speaking of a decision of the Court of Delegates that a certain citation was a nullity, Le Blanc, J., says: "That I think is to be assumed from the ultimate decision of the Court of Delegates, which is a court of competent jurisdiction, *and whose sentence is to be considered as compulsory on us.*" Indeed, if the Judicial Committee cannot conclusively determine on the propriety of the steps in their own court for arriving at a conclusion, which it is conceded they can arrive at by *some* steps, they will be the only tribunal in the country to which such a power is denied.

I am quite unable to accede to the position that the Judicial Committee of the Privy Council can be prohibited in the exercise of its functions by the judges of any portion of the Supreme Court; yet this is a position almost essential (and quite rightly so treated by the Lord Chief Justice) to the maintenance of the judgment of the Court below. Still less am I able to accede to the reason for this opinion given by him in his very powerful judgment, viz., that the jurisdiction of the Court of Delegates was transferred to the Privy Council, and that as the Delegates were so often prohibited as to shew that they were liable to prohibition,

(1) Law Rep. 3 P. C. 409. (2) Law Rep. 4 P. C. 301. (3) 3 M. & S. 426.

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so is the Judicial Committee, so long as it is exercising the jurisdiction of the Delegates, subject likewise to prohibition. With great deference, I do not think this consequence follows. The jurisdiction of the Courts Christian in matters testamentary and matrimonial was by 20 & 21 Vict. cc. 77, 85, respectively transferred to her Majesty, to be exercised in the modern Courts of Probate and Divorce. The appeal, which had before been to the Delegates and the Privy Council, was transferred to the House of Lords. No new jurisdiction was created; the old jurisdictions were transferred. Did the House of Lords, so long as it was exercising this final jurisdiction, become subject to the controlling jurisdiction of the courts at Westminster by way of prohibition? If the appeal from the Court of Probate had been given by statute to the Court of Common Pleas or the Court of Queen's Bench, would either court have become subject to prohibition from the other? Surely not. The jurisdiction is transferred to a court, and that court exercises it as part of its own jurisdiction, subject to prohibition or not according as the court itself was or was not subject before the transfer. Was then the Privy Council subject to prohibition before this transfer? It is true that in *Ex parte Smyth* (1), the point appears to have been assumed, but the Court decided against the application for prohibition without hearing any argument against it. The case of the *Bishop of Exeter* v. *Gorham* (2) was argued on both sides in the Court of Exchequer only, as the Courts of Queen's Bench and Common Pleas had previously refused the rule. In the Exchequer there is no doubt that Sir John Jervis, one of the acutest and ablest lawyers of modern times, while questioning the power of that particular Court to grant prohibition, appears to have conceded the existence of the power in the Queen's Bench and Common Pleas. In the judgment of the Court in 5th Exchequer the point is not noticed, nor does it appear to have been ever decided. This state of authority leaves me free to say that it seems to me very difficult, if not impossible, to maintain the existence of the power.

The Queen in Council is in many matters, including ecclesiastical matters, the Supreme Court of Appeal. The Judicial Committee of the Privy Council humbly advise her Majesty, or report

(1) 2 C. M. & R. 748. (2) 5 Ex. 630.

their opinion to her Majesty, and probably all the members of this Court have been present when such reports have been presented to her Majesty, and have been formally approved by her ore tenus, and as her own personal act. As she approves on the advice of a minister, I entertain no doubt that on the same advice, and subject to the minister's responsibility to Parliament, she could disapprove; and it seems equally difficult to prohibit Privy Councillors from giving advice, or to affect in the Queen's name to prohibit the Queen herself. Yet this is not an otiose or merely curious inquiry; because although it is not absolutely necessary to decide the point, and I do not presume to decide it, yet if the Judicial Committee cannot be prohibited, they may be appealed to in order to enforce Lord Penzance's order, if he refuses to enforce it, in obedience to the prohibition of the Queen's Bench; and as the Judicial Committee have already decided that such an order is valid, there can be no reasonable doubt that they would enforce it, and the conflict of courts would be at the least highly inconvenient. Nor could the conflict be avoided in this case, because the writ, as I understand it, is directed to the court itself, and, if it could be, it is not directed to the party. No doubt, if a party to a cause takes any steps to enforce a prohibited decree or judgment, he may be punished by the Court which prohibits. But if he applies only to the Court which has been prohibited to enforce its order, and upon refusal appeals to a Court which cannot be prohibited, I much doubt if there is any authority for saying he would be guilty of contempt. And if he were, the spectacle would be presented of a person imprisoned for contempt in taking steps to enforce an order which a Court, not subject to prohibition, declared to be perfectly valid and proceeded to enforce. All this seems to me to shew the extreme inconvenience of holding that a procedure or practice (for I do not desire to assume a point in dispute), upheld by the highest Ecclesiastical Court is ground for prohibition when pursued by an inferior one. I admit, of course, that this consideration is not absolutely conclusive. But on the whole, I answer my second question by saying that there seems to me to be abundant authority for holding that the suspension in this case was warranted by the course and practice of the Ecclesiastical Courts.

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It is said, however, that it cannot be regarded as procedure only. Now this is a very difficult question to discuss. What is procedure, and therefore, if wrong, matter of appeal only; and what is jurisdiction, and if wrongly asserted, matter for prohibition, is almost impossible to define in general language. The same thing will often strike different minds, some as error in procedure, some as excess of jurisdiction. I do not pretend to speak with confidence in a matter where so many of my colleagues differ from me, but I am unable to see that this is anything but procedure.

7 Moo. P.C. Cas. 242

The subject-matter is clearly within the jurisdiction of the Court Christian. It matters not that, as has been suggested, Mr. Mackonochie might be indicted for breach of the statute law in ministering contrary to the Act of Uniformity. He is accused of an ecclesiastical offence. The punishment is one which for this offence the Court Christian may inflict. It is said that it has been arrived at by wrong process. I do not think so; but if it has, what is arriving at a legitimate end by a wrong road but erroneous procedure? In *Ex parte Smyth* (1) the Court of Appeal decided something not matter of appeal, and on which the appellant had not been heard: Held procedure. In *Couch* v. *Toll* (2) the Court had proceeded then to sentence, without any citation of the person sentenced: Held that, whether citation was needful by the practice of the Court or not, it was error in procedure and not matter of prohibition. In *Shatter* v. *Friend* (3) the prohibition went because the judges thought the matter a temporal one—it was a question of proof of payment by a single witness; but it was admitted that if it had been ecclesiastical the prohibition would have been refused; and Lord Holt doubted, though he ultimately concurred with the rest of the Court, and admitted that the resolution of all the judges (reported by Lord Coke in 2nd Inst. 608) was "mighty strong" with his doubt, as indeed, says Sir Bartholomew Shower, the reporter, it certainly was. In *Breedon* v. *Hill* (4) Lord Holt lays down the principle in these terms: "When the Ecclesiastical Courts are possessed of a cause which is merely of spiritual conusance, the Courts at common law

(1) 2 C. M. & R. 748; 3 A. & E. 719.
(2) March. 98.
(3) 1 Sho. 158, 172.
(4) 1 Ld. Raym. 221.

allow them to pursue their own methods in the determination of it." In *Rex* v. *Payton* (1) one of the grounds of the prohibition (the other two not being material here) was, that the Ecclesiastical Court had pronounced a sentence not warranted by law or practice; but Lord Kenyon said, delivering the judgment of the Court (himself, Grose, and Lawrence, JJ.), "that is only a ground of appeal; *it is merely that the judge has not proceeded according to the proper forms of the Ecclesiastical Court.*" In *Ackerly* v. *Parkinson* (2) the question was not one directly of prohibition, but it was an action against ecclesiastical judges for proceeding to sentence in a cause begun by a citation, which, as the Delegates determined, was a nullity. It was held nevertheless that the proceedings, though erroneous, were not without jurisdiction; and Bayley, J., at page 428, makes these, to my mind, very pertinent remarks: "This is a matter which they must know as connected with their practice; but how are we as judges of the common law to know whether these proceedings have been such as the writ or canon law requires? Our knowledge of what is conformable or not to that law is chiefly derived from our practice of exercising jurisdiction over those Courts in the matter of granting prohibitions. If it appears that the ecclesiastical judge had either no jurisdiction, or has exceeded his jurisdiction, this Court is in the habit of interfering by granting a prohibition. But if the spiritual Court has jurisdiction" (Le Blanc, J., explains this by saying "over the subject-matter") "I am not aware of any instance in which this Court has granted a prohibition, *except in cases where it proceeds to the trial of a matter triable only by the common law, or allows a thing not allowed by the common law, or where the construction of a statute, which is peculiarly confined to the common law, comes in question.*" Subject to the argument arising upon the Church Discipline Act, every word of this appears to me in point in this case. In *Ex parte Story* (3) a prohibition was prayed for to restrain the Ecclesiastical Court from proceeding to punish a man for disobedience to decrees made behind his back and without notice. But Lord Wensleydale said: "There is no doubt that here the Ecclesiastical Court has jurisdiction over the suit; but if any

(1) 7 T. R. 153. (2) 3 M. & S. 411.

(3) 8 Ex. 201.

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proceeding of an irregular nature has taken place in that suit, it does not take away the jurisdiction of the Court, but merely gives the party a remedy by application to the Court itself, or by appeal. What has been done in this case does not amount to a contravention of natural justice."

In re Crawford (1) was not a case of prohibition, but of refusing or rather setting aside a habeas corpus; but it is worth notice as shewing that the Courts at Westminster will not interfere with the procedure of other Courts (the Court in question was the Chancery of the Isle of Man), although such procedure would not be lawful if pursued by themselves.

Of course in none of these cases were the circumstances exactly the same as the circumstances in the cases before us. If they were, the arguments of counsel and our judgments would have been short indeed; but I think they establish this, that where the subject-matter is for the Court Christian, and where the act done is something which in itself the Court Christian can do, the steps by which the Court arrives at the act, however erroneous they may be, are matter of appeal and not ground of prohibition. I have said that I think the steps in this case right, but if I thought them wrong, my conclusion would be the same.

It is said, however, that if the procedure involves something contrary to natural justice the Court will be prohibited; and I agree it will, and ought to be. In this case the argument for the prohibition is hardly pushed so far as this; but it is said that the consequences of the procedure are monstrous; so monstrous and unreasonable as to shew that it cannot be really part of the course and practice of the Court Christian. The consequences cannot be stated with more force and cogency than they have been by the Lord Chief Justice in *Martin* v. *Mackonochie*. (2) It is said that this assumed jurisdiction would clothe the Dean of the Arches with power over a man for his natural life, and in every diocese in the province of Canterbury. I am not sure, with deference, that the wide extent of space follows from the contention of the Solicitor General; the indefinite duration of time no doubt does. Practically impossible cases also have been put of some perverse judge punishing a clerk under his procedure for acts which, though

(1) 13 Q. B. 613. (2) 3 Q. B. D. 773.

unlawful at the time of the original sentence, have meanwhile been decided by a Court of Appeal on further argument to be lawful. I do not think I need deal with such cases till, if ever, they arise. But the fair and reasonable result of the contention does not startle me. It is to be remembered that the original suit ascertains once for all the lawfulness or unlawfulness of the specified acts. That is res judicata, and no clerk can be or would be permitted to re-argue it. The law of the Church has been declared, and an officer of the Church has been ordered to obey it.

It is no doubt my fault, but I am really unable to see the hardship or absurdity of an officer of the Church being forced his whole life long to obey, on a particular matter, the law of his society when it has once been declared to him by proper authority. The law might have clearly said, no doubt, that every repetition of an act in public worship already decided to be illegal, must be the subject of a fresh suit, with every formality, expense, and delay incident thereto. But if it has not so said clearly, I see no absurdity, inconvenience, or injustice in the practice before us, which should lead us to hold that it has said so by inference. Except the right of discussing the law anew, which, I think, would not be permitted him, even in a fresh suit, the clerk has every other substantial right as fully and completely as he would have in a suit regularly instituted and formally conducted. The question is one of fact; has he or has he not done certain specified acts? And upon that issue he has the fullest opportunity of making the fullest defence. The argument ab inconvenienti is not conclusive, but it is certain that the consequences of holding that every act of disobedience to a monition is a fresh offence, in the sense of requiring a fresh suit to establish its unlawful character, will be, I do not say to destroy, but very gravely to impede all reasonable ecclesiastical discipline; and that these consequences will at once arise there can be no doubt.

There is a matter on which little stress has been laid, I am not sure that it has been adverted to, but which seems to deserve a word of notice before I pass to the last point which I have to notice. It has been suggested, as something irregular and unheard of, that a man should be suspended for a repetition of his offence

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upon mere notice and without a regular suit. But excommunication, from the ecclesiastical point of view, was a worse punishment than suspension, and excommunication certainly might be so inflicted. "If," says Godolphin, page 626, "the same party for the same cause be excommunicated again, there needs not any previous citation or monition as before: Nam excommunicatio quæ fit sæpius ex eâdem causâ potest fieri nullâ citatione nullâque monitione præviâ. For, in truth, the excommunication in such case is not any new sentence of excommunication, but only a renovation of the former with an aggravation, for which reason it is that such excommunication as is again pronounced against the same person for the same cause repeated by him may be nullâ citatione nullâve monitione præcedente. Whence it doth appear that a person excommunicated may be excommunicated again, either for the same or some other new cause."

I answer, therefore, the third question, with which I started, by saying that, in my opinion, if what has been done were ever so erroneous it is matter of procedure only, and no ground for prohibition.

Lastly, however, it is said that this a proceeding to punish a clerk for an ecclesiastical offence; that the proceeding has been taken otherwise than according to the provisions of the Church Discipline Act, and that, therefore, prohibition must go. The words of the Church Discipline Act (3 & 4 Vict. c. 86), s. 23, are perfectly clear. "No criminal suit or proceeding against a clerk for any offence against the laws ecclesiastical shall be instituted in any Ecclesiastical Court otherwise than is hereinbefore enacted and provided." If this proceeding violates this statute, no doubt it must be prohibited. And on this point I have felt some hesitation, not so much from the words of the statute itself as from the language in which Lord Penzance has described his own proceeding in *Combe* v. *Edwards*. (1) I was for some time disposed to think that he meant to say he had punished Mr. Mackonochie for fresh offences against the law ecclesiastical *as fresh offences;* and I must take the freedom to say that I still think his language is open to that construction. If he had done this, and if what he did could be regarded in no other light, I should think it wrong,

(1) 3 P. D. 114.

as being contrary to the statute, and that he ought to be prohibited. But this is not, to my mind, the true interpretation of the paragraph of his judgment in *Combe* v. *Edwards* (1), to be found at p. 114, even taken by itself; still less is it, if read by the light thrown upon the passage by the whole judgment. Lord Penzance explains at some length earlier in his judgment, his view of the power of the Court to suspend for disobedience to the Court's monition; and thus in the passage just referred to he meant, I think, to say that he punished Mr. Mackonochie for disobedience and contempt, and that he punished by suspending him rather than in any other way, because the mode in which he shewed contempt was in the repetition of grave offences against the ecclesiastical law. This, which I think is the true view of the passage, and of the acts of the Court which the passage describes, makes both, in my opinion, perfectly correct. I doubt, besides, whether the words of Lord Penzance, even if I construe them wrongly, can be treated as ascertaining conclusively the character of his act. That must be judged of by the formal proceedings themselves, and if the application made to him called on him only to do what the law and practice of his Court allows, and if he did no more than the application called on him to do, I think we are not called upon, possibly are not entitled, to inquire further.

Now I think the application did call on him to do no more than the law allowed, and I think he did no more than he was called on to do; and I think, therefore, that what Lord Penzance did was no more than the practice of his court warranted, and the practice of his court was not contrary to nor abrogated by the Church Discipline Act.

For these reasons:—1. The 23rd section only forbids proceedings to be *instituted* in an Ecclesiastical Court otherwise than is enacted and provided. But if I am right in the earlier portions of my judgment this proceeding was not *instituted* at all in any ordinary and fair sense of that word. It was a part of the procedure in a cause or proceeding, which cause or proceeding was *instituted* in 1874.

2. The Act does not in any way affect the proceedings or practice of the Ecclesiastical Courts; it prescribes only certain

(1) 3 P. D. 114.

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forms of procedure by which clerks may either be corrected without being brought into the courts at all, or if recourse is had to the courts, it prescribes the mode in which, if I may be permitted the expression, the clerk is to be got into them. If the clerk submits to the bishop (s. 9) sentence is to be "pronounced according to the ecclesiastical law." If he does not submit, and the bishop formally hears the case, he is (s. 11) "to pronounce sentence thereupon according to the ecclesiastical law." All sentences pronounced under these two sections (sentences *not* of an old or known Court be it observed) are (s. 12) to be "good and effectual in law; and such sentences may be enforced by the like means as a sentence pronounced by an Ecclesiatical Court of competent jurisdiction." But when the case is heard by letters of request (under s. 13) in the Court of Arches, or in the Metropolitan Court of York (old-established courts), then the words of the statute change, and the case is "to be there heard and determined according to the law and practice of such court." The 15th section provides generally for appeals, and that they shall be heard in like manner as is enacted in the 13th section as to cases sent by letters of request. The 20th section, which is one of limitation, is important as shewing what the term "instituted" means in this statute. I need not examine the whole section. It is not easy to construe, but its language underwent a most elaborate and minute dissection in the judgment of the Privy Council in *Ditcher* v. *Denison* (1) pronounced by Lord Justice Knight-Bruce. It results from the judgment that the institution or commencement of any suit or proceeding *in a court* is the issuing and service of a citation. The point before us was not before the Judicial Committee in that case, and of course they do not decide it; but it follows from what they do decide, that *if* this be a proceeding, then any step taken to enforce a monition is a proceeding likewise; and that to excommunicate and imprison for contumacy would equally require all the preliminary processes of the Act to be gone through, in order to arrive at a sentence because it is a *proceeding* against a clerk in an Ecclesiastical Court for an offence against the laws ecclesiastical, which can only be got into or initiated in an Ecclesiastical Court according

(1) 11 Moore, P. C. 324.

to the provisions of the Act. It follows, also, that if every step taken to enforce a judgment is a "*proceeding*" within the meaning of the Act, then after two years from the original offence nothing by s. 20 can be done in respect of it, a conclusion which seems to me certainly very difficult if not impossible to accept.

In truth a careful examination of the statute shews that the legislature had no intention of interfering in any way with, that on the contrary it took special pains to preserve, the course and practice of the Ecclesiastical Courts, when once the case of a criminous clerk came before them. If, therefore (and the discussion on this question I will not renew), what Lord Penzance has done was according to the practice of his court, I am of opinion that the Church Discipline Act has in no way affected his powers or limited his jurisdiction. I do not think it necessary to examine in detail the Statute of Citations, 32 Hen. 8. So far as it is inconsistent with the Church Discipline Act, the later statute repeals it, but it is not inconsistent with the later Act in anything material to be considered.

I may conveniently end this long judgment by stating, in much better language than my own, the opposite contention, and drawing from the negatives of that contention what I think is the right conclusion in the matter. "This," it is said," "is primâ facie a proceeding to obtain punishment for a violation of the Act of Uniformity. This proceeding is primâ facie a proceeding contrary to the terms of the Church Discipline Act. The answer suggested is that it is a legal consequence of the suit which had proceeded to a hearing and a definitive sentence—a consequence warranted by the established law and practice of the Ecclesiastical Court, and not inconsistent with the common and statute law of the realm. But it is not shewn to have been so warranted, and it is shewn to be inconsistent with the statute." Nothing can be more clearly or tersely put, which I may say, because the language is not my own, but that of one of my colleagues to whom every deference is due. I venture to state what I conceive I have shewn, in the negatives of these propositions. I will not say what the proceeding may be primâ facie, but I think it is shewn on a review of the authorities to be in truth *not* a proceeding to obtain punishment for a violation of the Act of Uniformity, *but* a proceeding to

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enforce obedience to a legal order of the Court, though it may be that the act of disobedience was an act which did violate the Act of Uniformity. Again, I will not say what the proceeding may be primâ facie; but I say that on a true view of the provisions of the Church Discipline Act, the proceeding is not contrary to such provisions. If so no answer is required; but I say that it is a legal consequence of the suit which had proceeded to a hearing and definitive sentence, a consequence which is shewn to be warranted by the established law and practice of the Ecclesiastical Courts, and is also shewn to be not inconsistent with the common and statute law of the realm.

I need not say in the face of the disagreement in this Court, and remembering the great powers and eminence of the judges in the Court below, that I arrive at these conclusions with unfeigned diffidence and self-distrust. But I have arrived at them, after much labour and reflection, clearly and distinctly. It is therefore my duty to express them, and to say that, in my opinion, the judgment of the Court below ought to be reversed.

Judgment reversed.

Solicitors for Dean of Arches, and for promoter: *Moore & Currey.*

Solicitors for defendant: *Brooks, Jenkins, & Co.*

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1 C. P. D. 1 P. D.

In the Third Series,
1 App. Cas.

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COPYRIGHT—*continued.*
caused entries to be made in the register at Stationers' Hall, representing him to be the sole proprietor of the liberty of performing the musical compositions:—*Held*, upon motion by H. and R., that the entries must be expunged; for C., by the deed made in 1843, had granted the sole liberty of performing the musical compositions to D. and M., and therefore could not in 1878 grant it to A. *Ex parte* Hutchins & Romer 90; C. A. 483

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2. —— *Jurisdiction of County Court to grant Injunction against Nuisance, and to commit to Prison for Disobedience—Judicature Act*, 1873, *s.* 25, *sub-s.* 8, *s.* 89—*Order XLII., rule* 5.] Under the Judicature Act, 1873, s. 89, a county court has, in actions within its jurisdiction, power to grant an injunction against a nuisance, and to commit to prison for disobedience thereof. *Ex parte* Martin - - - - - 212

3. —— *Jurisdiction of County Court to grant and enforce Injunction against Nuisance—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25. *sub-s.* 8, *s.* 89; *Order XLII., rule* 5.] A county court, under the Judicature Act, 1873, s. 89, has, in actions within its jurisdiction, power to grant an injunction against a nuisance and to enforce obedience to it by committal. Martin *v.* Bannister - - - - - C. A. 491

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2. —— *Libel—Criminal Information—Authority, Consent, or Knowledge of Defendant, Publication without—6 & 7 Vict. c.* 96, *s.* 7—*Liability of Proprietor of Newspaper for Acts of Editor.*] The 7th section of 6 & 7 Vict. c. 96, enacts that "whensoever upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part."—On the trial of a criminal information for libel against the proprietors of a newspaper it appeared that the defendants had appointed an editor with general authority to conduct the paper, and left it entirely to his discretion what should be inserted therein, and that such editor had inserted the libel in question without the knowledge or express authority of the defendants. The jury found the defendants guilty. On a motion for a new trial on the ground that the verdict was against evidence, and of misdirection:—*Held* (by Cockburn, C.J., and Lush, J., Mellor, J., dissenting), that the general authority given to the editor was not per se evidence that the defendants had authorized or consented to the publication of the libel, within the meaning of 6 & 7 Vict. c. 96, s. 7; and that, as the learned judge at the trial had summed up in terms which might have led the jury to suppose that it was, and the jury had apparently given their verdict on that footing, there must be a new trial. The Queen *v.* Holbrook - - - - 42

3. —— *Perjury—Petty Sessions—Jurisdiction of Justices—Information—Warrant, Illegal Issue of.*] H., a police constable, procured a warrant to be illegally issued, without a written information or oath, for the arrest of S., upon a charge of "assaulting and obstructing him, H., in the discharge of his duty." Upon such warrant S. was arrested and brought before justices, and was, without objection, tried by them and convicted.—H., was afterwards indicted for perjury committed on the said trial of S., and convicted:—*Held*, by

CRIMINAL LAW—*continued.*
Lord Coleridge, C.J., Denman, J., Pollock and Huddleston, BB., Field, Lindley, Manisty, Hawkins, and Lopes, JJ. (Kelly, L.C.B., dissenting), that H. was rightly convicted, notwithstanding that there was neither written information, nor oath, to justify the issue of the warrant, and that the justices had jurisdiction to hear the charge, though the warrant upon which the accused was brought before them was illegal. The Queen *v.* Hughes - - - - C. C. R. 614

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EASEMENT—*Light—Unity of Ownership—Dominant Tenement under Lease at Time of Severance of Ownership—Alteration of Dominant Tenement—Destruction of Easement.*] The implication of a grant of easements of a continuous and apparent character, upon the alienation to different persons of tenements previously in the ownership of the same person, is not prevented by the fact that the dominant tenement at the time of the alienation is in lease, and consequently not in the possession of the alienor.—There being a right to the access of light to windows in the walls of certain cottages, the walls of some of the cottages were set back and windows made in the new walls of the same size, and in the same relative positions as the former windows in the former walls:—*Held*, that the easement of light was not thereby destroyed.—In the case of another of the cottages the occupier made an addition thereto, and for the purpose of so doing built a new wall with a window in it outside the old wall and window at a different angle, but the old window remained inside the new one, and still continued to receive the light:—*Held*, that the right to the access of light to the old window was not destroyed. Barnes *v.* Loach [494

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ECCLESIASTICAL LAW—*Church Discipline Act* (3 & 4 *Vict. c.* 86), *s.* 3—"*It shall be lawful*"—*Statute, Construction of—Words importing Obligation—Discretion of Bishop to refuse to issue Commission on Complaint of Ecclesiastical Offence—Public Worship Regulation Act*, 1874 (37 & 38 *Vict. c.* 85)—*Statute, Authority for Interpretation of—Debate in House of Lords—Speech of Lord Chancellor.*] When a complaint is made under the Church Discipline Act, s. 3, to a bishop that within his diocese an offence against the laws ecclesiastical has been committed by a clerk in holy orders, the bishop has a discretion whether he will issue a commission to inquire into the truth of the complaint, and no mandamus will lie to compel him to do so.—Decision of the Queen's Bench Division (4 Q. B. D. 245) reversed.—During the argument of a case before the Court of Appeal counsel proposed to cite as an authority for the interpretation of the Church Discipline Act, s. 3, the opinion of the Lord Chancellor as to its construction, contained in a speech delivered by him during a debate in the House of Lords upon the third reading of the Public Worship Regulation Act, 1874:—*Held*, by Bramwell and Baggallay, L.JJ., Thesiger, L.J., doubting, that the speech of the Lord Chancellor might be lawfully read for that purpose by counsel during his argument. The Queen *v.* Bishop of Oxford 245; C. A. 525

2. —— *Court of Arches—Monition attached to definitive Sentence—Suspension ab officio et beneficio, for subsequent Offence, on Motion—Prohibition—53 Geo. 3, c. 127—Church Discipline Act* (3 & 4 *Vict. c.* 86).] In a criminal suit against a clerk instituted in an Ecclesiastical Court, a monition to abstain in future from the commission of unlawful acts may be attached to a definitive

ECCLESIASTICAL LAW—*continued.*
sentence; and if the monition be disobeyed, the clerk, upon motion and without a fresh suit, may be condemned to suspension ab officio et beneficio; and such a proceeding is not in contravention of the Church Discipline Act (3 & 4 Vict. c. 86).—So *held*, overruling the decision of the majority of the Queen's Bench Division, by Lord Coleridge, C.J., James and Thesiger, L.JJ.; Brett and Cotton, L.JJ., dissenting. Martin *v.* Mackonochie [C. A. 697

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ELEMENTARY EDUCATION ACT (33 & 34 *Vict. c.* 75, *Second Schedule, First Part*), *Rules* 12, 14—*Election of Members of School Board—Disqualification for Re-election—Absence for Six Months from Meetings.*] A member of the school board who, in accordance with 33 & 34 Vict. c. 75 (Second Schedule, First Part), Rule 14, ceases to be a member, by reason of six successive months' absence from the meetings of the board without sufficient excuse, is not permanently disqualified for the office, but is re-eligible for election at any succeeding triennial election of members of the board. The Queen *v.* Turmine - - 79

2. —— (39 & 40 *Vict. c.* 79), *ss.* 11, 12—*Evidence—Conviction for Non-compliance with Attendance Order.*] An order of the court of summary jurisdiction under the Elementary Education Act, 1876, imposing a penalty on the parent of a child for non-compliance with a previous order for the attendance of the child at school, may be proved in subsequent proceedings by the minute books of the court containing an entry of the order; and it is unnecessary to produce a copy of the order signed by the clerk of the peace or other officer of the sessions. The London School Board *v.* Harvey. - - - - - 451

3. —— (36 & 37 *Vict. c.* 86), *s.* 10—*Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *ss.* 53, 54—*School Board—Borrowing Powers—Temporary Loan for Current Expenses.*] A school board have power, when the school fund proves insufficient, to contract a temporary loan for the purpose of meeting their current expenses until they can obtain money out of the rates. The Queen *v.* Sir Charles Reed - - 477

4. —— (33 & 34 *Vict. c.* 75), *s.* 74—*School Board—Bye-laws—Attendance of Child at School—Factory, Child employed in.*] A school board is not entitled to enforce the provisions of its bye-laws, with regard to the hours of attendance of children at school, in the case of children employed in factories who are attending efficient elementary schools pursuant to the Factory Acts.—The Elementary Education Acts do not control the provisions of the Factory Acts regulating the education of children employed in accordance with those Acts. Mellor *v.* Denham - - 241

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FISHERY—*Salmon Fishery Act*, 1861 (24 & 25 *Vict. c.* 109), *s.* 20—*Fishing Mill Dam—Abandonment of Fishery.*] Where a dam had been used as a fishing mill-dam up to a date subsequent to the passing of the Salmon Fishery Act, 1861, but the use of it for fishing purposes was then abandoned and all appliances for fishing removed:—*Held*, that the dam had ceased to be a "fishing mill-dam" within the statute, and had become an ordinary mill-dam, and that consequently the 20th section of the Salmon Fishery Act, 1861, did not apply, and the occupier of the dam was not bound to remove obstructions to the free passage of fish as required by the section. Rossiter *v.* Pike - - - - - - 24

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—— Sale of goods in fraud of pledgee—Innocent purchaser - - - - 394
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FRAUDULENT CONVEYANCE—13 *Eliz. c.* 5—*Delaying Creditors.*] A debtor in insolvent circumstances executed a deed by which he conveyed all his estate to trustees on trust to carry on his business, or get in and realize his estate in the manner they might deem expedient, and apportion the residue of the proceeds after payment of expenses, &c., according to an equal pound rate among his creditors. It was provided by the deed that a dividend should only be payable to a creditor on his executing or assenting to the deed; and that, if within a certain time any creditor did not execute or assent, his dividend should be paid by the trustees to the debtor. The deed also provided that the executing and assenting creditors should indemnify the trustees against any personal loss or risk they might sustain, otherwise than by their own wilful negligence or default, by reason of their proceedings under the deed:—*Held*, that the deed was fraudulent and void under 13 Eliz. c. 5, as tending to defeat or delay creditors. Spencer *v.* Slater - - - - 1

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FRIENDLY SOCIETY—*Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *ss.* 22, 30—*Arbitration, Rule for Settlement of Disputes by—Court of Summary Jurisdiction.*] The provisions of sect. 30 of 38 & 39 Vict. c. 60, apply to all friendly societies, not only to friendly societies receiving contributions by means of collectors at a greater distance than ten miles from the registered office of the society. Consequently, though the rules of a friendly society provide for the settlement of disputes between the society and members by arbitration, a Court of summary jurisdiction has jurisdiction under 38 & 39 Vict. c. 60, s. 30, to decide such disputes. Re Alfred Holt - - 29

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HIGHWAY—*Diversion—Validity of Certificate of Justices*—5 & 6 *Wm.* 4, *c.* 50, *s.* 85.] Justices in certifying under 5 & 6 Wm. 4, c. 50, s. 85 that they have viewed a highway proposed to be diverted, and that the proposed new highway is nearer or more commodious to the public, must so certify from their own inspection, and not as the result of inquiries from other persons.—When, therefore, justices certified that the proposed new highway would be more commodious to the public than the present highway because "upon inquiries" they found that the old path was inconvenient, and the new path convenient:—*Held*, that the certificate was invalid. The Queen *v.* Sir R. Wallace - - - - 641

2. —— *Furious Driving on—Highway Act* (5 & 6 *Wm.* 4, *c.* 50), *s.* 78—"*Carriage*"—*Bicycle.*] A person, riding a bicycle on a highway at such a pace as to be dangerous to the passers by, may be convicted of furiously driving a carriage, under 5 & 6 Wm. 4, c. 50, s. 78. Taylor *v.* Goodwin [228

3. —— *Turnpike Road—Highway, Contribution to Repair of out of Highway Rate*—4 & 5 *Vict. c.* 59, *s.* 1.] An Act of Parliament authorized trustees to establish a ferry and make certain highways in connection therewith. The trustees were also empowered to take tolls, out of the proceeds of which the ferry and roads were to be maintained. No limit of time was specified by the Act for the expiration of the trust. The Act also provided that, in case the works thereby authorized should not be executed within the space of ten years, all the powers and authorities thereby given should cease and determine, save only as to so much of the work as should have been completed within that time.—The trustees established the ferry and made all the roads specified in the Act but one. The funds arising from the tolls becoming insufficient for the repair and maintenance of the roads so made, an application was made by the trustees to justices for an order for contribution to the repair of one of the roads so made, out of the highway rate under 4 & 5 Vict. c. 59, s. 1:—*Held* (affirming the decision of the Queen's Bench Division), that the trust created by the Act was a turnpike trust within the meaning of 4 & 5 Vict. c. 59; and, secondly, that, inasmuch as the Act merely authorized and did not compel the making of the roads thereby specified and contemplated that all the works might not be executed, the construction of the whole system of roads authorized to be made was not a condition precedent to the roads that were made becoming highways, and consequently that

HIGHWAY—*continued.*
an order of contribution to the repair of the road in question might be made under 4 & 5 Vict. c. 59, s. 1.—*Rex* v. *Cumberworth* (3 B. & A. 108) overruled. The Queen *v.* French - C. A. 507

4. —— *Materials for Repair of—Licence to get in Inclosed Lands—Duration of Licence*—5 & 6 *Wm.* 4, *c.* 50, *ss.* 53, 54.] A licence granted by justices to get materials from inclosed land for the repair of the highways under 5 & 6 Wm. 4, c. 50, ss. 53, 54, does not continue indefinitely, but is limited to the necessities of the particular occasion in respect of which it was granted. Earl Manvers *v.* Bartholomew - - 5

5. —— *Turnpike Road—Toll-house "useless and no longer required for purposes of Road"*—4 *Geo.* 4, *c.* 95. *s.* 57.] A toll-house erected by turnpike trustees on a highway was for some years used for the collection of tolls. The toll-bar attached to the house was then taken down, and for twelve years subsequently no toll had been collected at the house, which had been in the occupation of a man employed by the road surveyors for the repair of the road. It was stated by the trustees that they might, at some future period, again require to use the house on the collection of tolls:—*Held*, that the owner of the land adjoining was entitled to a mandamus to compel the trustees to pull down the toll-house and remove the materials, for it must be taken to have become "useless and no longer required for the purposes of the road" within the meaning of 4 Geo. 4, c. 95, s. 57. The Queen *v.* Greenlaw Road Trustees - - - - 447

HOSPITAL—Infectious disease—Liability of managers - - - - 433
See Nuisance.

INDEMNITY—When required—Assignor and assignee of chose in action - 280
See Practice. 3.
ILLEGALITY—Agreement to pay rent without deducting property-tax - 220, 607
See Property Tax.
—— Stock Exchange—Time bargains - 685
See Stock Exchange.
ILLEGITIMATE—Child under sixteen—Settlement—Poor Law - - - 409
See Poor Law. 4.
INCUMBENT of church, not owner within the meaning of the Metropolitan Building Act - - - - - 75
See Metropolitan Building Act.
INFORMATION—Criminal—Publication of libel in newspapers without knowledge of proprietors - - - - 42
See Criminal Law. 2.
INJUNCTION—Jurisdiction of county court to grant - - - - 212
See County Court. 2.
—— Jurisdiction of county court - - 491
See County Court. 3.
INSURANCE, MARINE—*Chartered Freight—Restraint of Princes—Charterparty void or voidable in event of War.*] The plaintiffs chartered the ship *Edgar* to C. by charterparty in which it

INSURANCE, MARINE—*continued.*

was agreed that the ship after completing intermediate employment (which she was to be at liberty to take) should proceed to Galatz for orders to load there, &c., and being so loaded proceed to Malta for orders. Upon the margin of the charterparty were the words, "In the event of war, blockade, or prohibition of export preventing loading, this charterparty to be cancelled." The plaintiffs then effected a policy with the defendants for the insurance of the freight of the ship against perils of the sea, restraint of princes, &c. The *Edgar* sailed for Genoa under the charterparty on the 1st of May, 1877, war having been declared by Russia against Turkey on the 24th of April. Before her arrival at Genoa, the plaintiffs ascertained that Russia had closed the ports of loading mentioned in the charterparty. The *Edgar*, however, discharged her cargo, and took in ballast at Genoa and sailed for Constantinople, and upon her arrival there on the 28th of May, found that the loading ports were closed, and that there was no reasonable probability of their being open in time for her to load her chartered cargo. She therefore did not proceed further towards Galatz, but obtained a homeward cargo at a freight less than that stipulated for by the charterparty. In an action upon the policy:—*Held*, by the majority of the Court (Cockburn, C.J., Manisty and Lush, JJ., dissenting) that the plaintiffs could not recover, for according to the true construction of the charterparty the act of closing the ports by the Russian government was a prohibition of export preventing loading, and that upon the happening of that event the charterparty came to an end—without any election by either party.—By Lush, J., dissenting, that the effect of the memorandum in the margin was to make the charterparty voidable only at the option of either party, that neither party having elected to avoid it the charterparty continued in force up to the time when the loading became impracticable, and that the plaintiffs had sustained such a loss of the chartered freight as to entitle them to recover. Adamson *v.* Newcastle Steamship Freight Insurance Association - 462

2. —— *Deduction from Freight for Sea-damage—Insurance against loss of Freight—Extent of Underwriters' Liability—Calculation of.*] The plaintiffs, shipowners, entered into a charterparty which provided for payment of freight at a specific rate, and that "If any portion of the cargo be delivered sea-damaged the freight on such sea-damaged portion to be two-thirds of the above rate." They effected an insurance with underwriters, "To cover only the one-third loss of freight in consequence of sea-damage as per charterparty." Sea-damage happened, and one-third of the freight on the sea-damaged portion of the cargo was deducted by the charterers from the total amount of freight:—*Held*, that the subject-matter of insurance was "the one-third loss of freight in consequence of sea-damage," and that the plaintiffs were entitled to recover from each underwriter such proportion of the amount of the loss as the amount of his subscription bore to the total sum for which the underwriters subscribed the policy. Griffiths *v.* Bramley-More - - - - C. A. 70

INTEREST OF JUSTICE—Disqualification 332
See Justices of the Peace.

INTERROGATORIES.
See Cases under Practice; Procedure.

JUSTICES OF THE PEACE—*Disqualification to hear a Complaint—Interest in Subject-Matter—Dogs Act*, 1871 (34 & 35 *Vict. c.* 56).] Three justices who were members of the town council of a borough and as such had taken an active part in the making of an order under the Dogs Act, 1871 (34 & 35 Vict. c. 56), sat to hear a complaint of non-observance of the order:—*Held*, that they had no such interest in the subject-matter as to oust their jurisdiction.—In the absence of any special provision for the mode of publication of the order, it is enough to shew that it has been posted up in five or six places within the borough. The Queen *v.* Justices of Huntingdon - 522

2. —— *Interest Disqualifying—Public Health Act*, 1875—*Town Council—Urban Sanitary Authority.*] Complaint having been made to the Local Government Board of a nuisance upon premises belonging to B., in the borough of W., the board communicated with the Town Council of W., who were the urban sanitary authority under the Public Health Act, 1875, and required them to abate the nuisance. The council having made inquiries, passed a resolution that steps should be taken for the removal of the nuisance, and took out a summons against B. At the hearing an order for the abatement of the nuisance was made. Two justices who were present were members of the town council when the resolution was passed.—*Held*, that the councillors who were justices had such an interest as might give them a bias in the matter, that consequently they ought not to have sat as justices upon the hearing of the summons, and that a rule for a certiorari to quash the order must be made absolute. The Queen *v.* Milledge - - - - - 332

LANDLORD AND TENANT—*Building Contract—Agreement to grant Lease—Collateral Contract—Contract to pay Rent for Land intended to be demised until Execution of Lease*—8 & 9 *Vict. c.* 106, *s.* 3.] By articles of agreement not under seal the plaintiff agreed to grant to the defendant a lease at a certain rent for ninety-nine years of a piece of land so soon as the latter should have erected upon it a messuage, and the defendant undertook until the execution of the lease to "hold the said piece of land and other the premises at the rent and subject to the conditions to be contained" in the lease. The defendant never entered upon or took possession of the piece of land:—*Held*, that although the articles of agreement did not operate as a demise, yet the defendant by a collateral contract to the intended lease had undertaken to pay the amount of the rent, and that it was immaterial that he had never entered upon possession of the lands. Adams *v.* Hagger - - - - - C. A. 480

—— Omission to deduct property tax from rent
See Property Tax. [220, 607

LANDS CLAUSES ACTS, 1845, 1869 — *Costs of Arbitration—Compensation for injuriously affecting Land.*] By a local Act incorporating the Lands Clauses Consolidation Acts, 1845, 1869,

LANDS CLAUSES ACTS, 1845, 1869—*continued.*
the defendants were empowered to lower a street, and compensation was to be assessed by a single arbitrator to be appointed by the Board of Trade. The arbitrator awarded compensation to the plaintiff, who had been injured by the lowering of the roadway, and the plaintiff sued to recover the costs of the arbitration, without having the assessment taxed by a master of the High Court:—*Held*, First, that the plaintiff was entitled to costs, for the substitution of a special tribunal was not inconsistent with the provisions of the Lands Clauses Consolidation Acts, 1845, 1869, relating to arbitration, and the right to costs thereby created remained unimpaired; and, secondly, that the taxation was not a condition precedent to the right to sue. Sharpe *v.* Metropolitan District Railway Company **C. A. 645**

—— Case stated by umpire—Court of appeal **412**
See Practice. 1.

LIBEL—Criminal law—Publication of newspaper without knowledge of proprietors **42**
See Criminal Law. 2.

LICENSING ACT, 1872 (35 & 36 *Vict. c.* 94), *s.* 52—*Appeal to Session—Recognizance to be entered into "immediately"—Mandamus.*] By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 52, any person aggrieved by any order or conviction made by a court of summary jurisdiction may appeal therefrom, subject to the conditions and regulations following:—(2) The appellant shall within seven days after the cause of appeal has arisen, give notice to the other party and to the court of summary jurisdiction of his intention to appeal and of the ground thereof.—(3) The appellant immediately after such notice shall enter into a recognizance before a justice with two sureties, conditioned personally to bring such appeal, &c.—At the hearing of an appeal under the above section it appeared that notice of appeal was given on Monday, March 10th, and that the recognizance was entered into on Friday, March 14. The sessions, no explanation of the delay being offered, dismissed the appeal:—*Held*, upon application for a mandamus for the sessions to hear the appeal, that affidavits accounting for the delay ought not to be considered, and that the sessions upon the evidence before them were warranted in finding that the recognizance had not been entered into "immediately" after the notice. The Queen *v.* Justices of Berkshire - - - **469**

LIGHT—Unity of ownership—Alteration of dominant tenement - - - **494**
See Easement.

LIMITATIONS, STATUTE OF—*Land annexed to a Deanery becoming vested in Ecclesiastical Commissioners*—3 & 4 *Wm.* 4, *c.* 27, *ss.* 2, 29—3 & 4 *Vict. c.* 113, *ss.* 50, 57, 75—*Inclosure—Allotment to Tenant in right of his Lease.*] Where land annexed to a deanery has become vested in the Ecclesiastical Commissioners by virtue of 3 & 4 Vict. c. 113, s. 50, their right of entry upon it is taken away by 3 & 4 Wm. 4, c. 27, s. 2, when twenty years have elapsed without their obtaining possession thereof, although the dean to whose estate they have upon his death succeeded might have recovered the land within sixty years by force of 3 & 4 Wm. c. 27, s. 29, and although by 3 & 4 Vict. c. 113, s. 57, the Ecclesiastical Commissioners have, for the purpose of obtaining possession of land vested in them under s. 50, all "rights, powers, and remedies, at law and in equity," which belonged to the dean.—Pursuant to an Act for the inclosure of certain common lands in the parish of A., the commissioner, acting in execution thereof, by his award made in 1827 allotted a piece of land to the personal representatives of R. M., in right of the lease of the *George and Dragon* in A., held under the Dean of A. The *George and Dragon* was the property of the Dean of A., and until 1820 was held under a lease to trustees for the next of kin of R. M.; in that year the lease was sold to J., who surrendered it and obtained a new lease. After 1820 several leases of the *George and Dragon* were granted, but none of them included the piece of land allotted as above-mentioned. The Dean of A., who was living at the passing of 3 & 4 Vict. c. 113, died in 1854, and thereupon by force of that statute the lands annexed to his deanery vested in the plaintiffs, who, in 1859, purchased the then subsisting lease of the *George and Dragon*, and acquired possession thereof; but they never obtained possession of the piece of land allotted as above-mentioned, and in 1877 brought the present action to recover it. The defendant had been in possession of the piece of land for twenty, but not for sixty, years:—*Held*, that notwithstanding ss. 50, 57, and 75, of 3 & 4 Vict. c. 113, the title of the plaintiffs, if any ever existed in the Dean of A., was barred by the lapse of twenty years, the period of limitation prescribed by 3 & 4 Wm. 4, c. 27, s. 2, and that they could not avail themselves of s. 29 of that statute, which allows deans and other spiritual corporations sole to recover land within sixty years.—*Quære*, whether under the award the reversion in the piece of land allotted in respect of the *George and Dragon* passed to the Dean of A., and whether he ever had any title thereto. Ecclesiastical Commissioners *v.* Rowe **C. A. 63**

LIQUIDATION BY ARRANGEMENT - 295
See Bankruptcy. 2.

LIVERPOOL PASSAGE COURT — *Costs—Action for Slander—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 91—*Rules and Orders of Judicature Act*, 1875—16 *Vict. c. xxi. ss.* 53, 54.] Under the Judicature Act, 1873, s. 91, which enacts "that the several rules of law enacted and declared in this Act shall be in force and receive effect in all courts whatsoever in England so far as the matters to which such rules relate shall be respectively cognizable by such courts," Order LV. (under the Judicature Act, 1875) is applied to proceedings in the Court of Passage of the borough of Liverpool; and a plaintiff who recovers a shilling damages in an action for slander tried by a jury in that court is entitled to his costs, unless the judge before whom the action was tried has ordered otherwise. King *v.* Hawkesworth - **371**

LOCAL GOVERNMENT ACTS—*Borough Rate—District Rate—Railway, whether assessable at full Value or one-fourth of its Value—Sanitary Expenses—Public Health Act*, 1872 (35 & 36 *Vict. c.* 79), *ss.* 7, 16—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 207, 211.] By a local Act passed in 1848 commissioners were appointed for sanitary

LOCAL GOVERNMENT ACTS—*continued.*

purposes over a district lying partly within and partly without the borough of W. They had power to levy an improvement rate, in which railways were to be assessed at one-fourth of their value. A railway company, whose line ran through the district, were assessed according to the provisions of the local Act up to the year 1872. By the Public Health Act, 1872, urban sanitary authorities were formed, and the council of the borough became the urban authority, and the jurisdiction of the commissioners over the part of their district lying within the borough was transferred to the council. By s. 16, if the Local Government Acts were not then in force in a borough, sanitary expenses were to be defrayed out of the borough rate, provided that, where an urban authority had before 1872 power to levy rates for sanitary purposes, the expenses thereof should be defrayed out of those rates. A borough rate has no limitation in favour of railways. By the Public Health Act, 1875, s. 207, the expenses of an urban authority under the Act were to be defrayed by a general district rate, but if in any district the expenses incurred by an urban authority, being the council of a borough, were in 1875 payable out of the borough rate, they should continue to be so charged. By s. 211, in making a general district rate railways were to be assessed at only one-fourth of their value. A borough rate was made for W. in December, 1876, in order to defray, amongst others, sanitary expenses, in which the railway company were assessed at the full value of their line:—*Held*, that the rate was bad, and that a general district rate, under the Public Health Act, 1875, s. 207, should have been made assessing the railway company at one-fourth of the value of their line. The Queen *v.* Overseers of Walsall - - - - C. A. 141

2. —— *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257—*Expense of sewering and paving Street—Liability of Owner of Premises—Change of Ownership before completion of Works—Owner "in default."*] Under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150, which enables the urban authority to give notice to the owners of premises abutting upon a street (not being a highway repairable by the inhabitants at large), to sewer, level, and pave it, and upon default to execute the works and recover the expenses from the owners in default, according to the frontage of their respective premises, such expenses cannot be recovered from any one who, though the owner of premises when notice was first given by the urban authority, has ceased to be owner before the completion of the works. The Queen *v.* Swindon Local Board - - - 305

3. —— *Highway—Turnpike Road—"Street," Definition of—Alteration of Level of Street—Damage—Compensation*—11 & 12 *Vict. c.* 63, *ss.* 2, 68, 144; 15 & 16 *Vict. c.* 42, *s.* 13; 21 & 22 *Vict. c.* 98, *s.* 41.] By the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 68, streets being highways within the district of a local board shall vest in and be under the management of the board, and the board shall cause all such streets to be levelled, paved, flagged, channelled, altered, and repaired as occasion may require.—By the interpretation clause (s. 2): "The word 'street' shall

LOCAL GOVERNMENT ACTS—*continued.*

apply to and include any highway (not being a turnpike road)." By s. 144 compensation shall be made to all persons sustaining any damage by reason of the exercise of the powers of the Act; and in case of dispute as to amount, the same shall be settled by arbitration in the manner provided by the Act.—The footpath of a street which was a highway and also a turnpike road within the district of a local board, was altered by them under an agreement with the turnpike trustees, so as to raise the level of the footpath in front of the house of the plaintiff and cause him damage:—*Held*, by Brett and Cotton, L.JJ., reversing the judgment of the Queen's Bench Division, Bramwell, L.J., dissenting, that a street which is also a turnpike road is not excluded by s. 2 from the operation of ss. 68 and 144, and that the plaintiff was therefore entitled to recover compensation from the board in the manner prescribed by s. 144. Nutter *v.* Accrington Local Board of Health [C. A. 375

4. —— *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 35, 36—*Water-closet, Earth-closet, or Privy, building a House without sufficient—One Privy for Two Cottages.*] The respondent built two cottages with one privy sufficient for the use of the occupiers of both cottages:—*Held*, that he had complied with the requirements of the 35th section of the Public Health Act, 1875, on the ground that the section does not require a separate water-closet, earth-closet, or privy for every house built or rebuilt. Guardians of Clutton *v.* Pointing - - - 340

5. —— *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 149—*Urban Authority, Streets to vest in—Street, Soil of—Possession, when sufficient to maintain Action against Wrong-doer.*] By an award made under an Inclosure Act, passed in 1766, two private roads, E. and H., were set out. About 1818, the road E. became a public highway. Down to 1863, the surveyors of highways for the parish of C., within which E. and H. were situate, had from time to time let the pasturage upon E. and H. to various persons. A local board was formed in 1863 for the parish of C., who in 1876 let the pasturage upon E. and H. to the plaintiff. He thereupon commenced to depasture the herbage with his cattle on the roads. The defendant interfered with the plaintiff's enjoyment of the pasturage.—By 38 & 39 Vict. c. 55, s. 4, a street includes any highway. By s. 144 every local board are within their districts surveyors of highways. By s. 149, all streets shall vest in and be under the control of the local board:—*Held*, affirming the judgment of the Queen's Bench Division, that by force of the above enactment the property in the soil of E., being a "street," so far vested in the local board that they could demise the right of pasturage thereon to the plaintiff, who was entitled to maintain an action:—*Held*, also, that the local board having no power to demise H., being a private way, the plaintiff had not sufficient exclusive possession as occupier to enable him to maintain an action. Coverdale *v.* Charlton [C. A. 104

—— Members of urban sanitary authority sitting as justices - - - - 332

See Justices of the Peace. 2.

LUNATIC—*Principal and Agent—Contract made with Agent of Lunatic—Notice to Contractee of Termination of Agent's Authority.*] The plaintiff was a tradesman, and the defendant had given his wife authority to deal with the plaintiff, and had held her out as his agent and as entitled to pledge his credit. Afterwards, the defendant became insane, and whilst his malady lasted, his wife ordered goods from the plaintiff, who accordingly supplied them. At the time of supplying the goods the plaintiff was unaware that the defendant had become insane. The defendant afterwards recovered his reason, and then refused to pay for the goods supplied to his wife by the plaintiff:—*Held*, that the defendant was liable for the price of the goods. Drew *v.* Nunn C. A. 661

—— Prisoner acquitted on ground of insanity—Maintenance of - - - 37
See Poor Law. 1.

MARINE INSURANCE.
See Cases under Insurance, Marine.

MARRIED WOMAN—Application for affiliation order in respect of child born before marriage - - - - 291
See Bastardy.

MEETING OF VESTRY—Notice of motion 367
See Vestry.

METROPOLITAN BUILDING ACT (18 & 19 *Vict. c.* 122), *ss.* 3, 69 *to* 74—*Dangerous Structure—"Owner"—Incumbent of Church—Liability for Repair.*] The incumbent of a district church in the Metropolis, although the freehold of such church is vested in him under the Church Building Acts, is not the "owner" of the church within the meaning of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122 Part II, Dangerous Structures), so as to be personally liable for the expenses incurred by the Metropolitan Board of Works in respect of such church as a dangerous structure. The Queen *v.* Lee - - 75

METROPOLIS MANAGEMENT ACT, 1855, *ss.* 159, 161—*District Rate—Expenses not incurred for equal Benefit of whole Parish—Equal Pound Rate.*] By the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 158, vestries and district boards are directed from time to time by order to require the overseers of the several parishes within their district to levy the sums which such vestries or district boards may require for defraying the expenses of the execution of the Act, and by s. 159, where it appears to any vestry or district board that all or any part of the expenses for defraying which any sum is by such vestry or board ordered to be levied—have or has not been incurred for the equal benefit of the whole of their parish or district, such vestry or board may by any such order direct the sum or sums necessary for defraying such expenses or any part thereof to be levied in such part, or exempt any part of such parish or district from the levy, or require a less rate to be levied thereon as the circumstances of the case may require.—*Held*, following *Howell* v. *London Dock Company* (8 E. & B. 212), that a precept to overseers under the above sections for the levy of a rate—which, after stating that the expenses in respect of which it was

METROPOLIS MANAGEMENT ACT, 1855—*cont.*
required were not for the equal benefit of the parish, required the rate to be levied as regards such parts of the parish as consisted of land used as arable, meadow, or pasture land only, or as woodland, orchard, market-garden, hop, herb, flower, fruit, or nursery ground in the proportion of one-fourth part only of the net annual value of such land,—was good, although the classes of land so mentioned in the precept did not lie together or form any particular division marked out by metes and bounds, but were scattered through the parish. The London and Brighton Railway Company *v.* Guardians of Lewisham - 389

MINE—Right of way unconnected with working of—Grant - - - - 412
See Practice. 1.

MONITION—To abstain in future from illegal acts - - - - - 697
See Ecclesiastical Law. 2.

MUNICIPAL ELECTION—*Corrupt Practices (Municipal Elections) Act*, 1872 (35 & 36 *Vict. c.* 60), *s.* 3—*Corrupt Practices Prevention, Act* 1854 (17 & 18 *Vict. c.* 102), *s.* 23—*Refreshments to Voters at Municipal Election.*] By the Corrupt Practices (Municipal Elections) Act, 1872, the provisions of s. 23 of 17 & 18 Vict. c. 102, by which giving refreshments to voters at parliamentary elections is made illegal under a penalty of forty shillings, are rendered applicable in the case of municipal elections. Hargreaves *v.* Simpson - 403

MUSIC—Right to exclusive performance of musical composition—Copyright - - 90
See Copyright.

NEGLIGENCE—Insufficiency of damages—New trial - - - - - 406
See Damages. 1.

—— Pulling down house—How far employer liable for contractor's negligence 162
See Support.

NEWSPAPER—Publication of libel by editor without knowledge of proprietors 42
See Criminal Law. 2.

NEW TRIAL—Insufficiency of damages—Negligence - - - - 406
See Damages. 1.

NUISANCE—*Hospital for Infectious Diseases—Asylum established by Order of Local Government Board—Liability of Managers—Metropolitan Poor Act*, 1867 (30 *Vict. c.* 6).] The defendants, under the powers given them by the Metropolitan Poor Act, 1867, built a hospital which they used for patients suffering from infectious diseases. In an action by adjacent landowners the jury found that the hospital was a nuisance to such landowners:—*Held*, by Pollock, B., first, that the Act did not make the defendants mere irresponsible agents to carry out the orders of the Local Government Board so as to exempt them from liability. —Secondly, that they were not exempt on the ground that they acted bonâ fide in the discharge of a duty cast on them by the Act. Hill *v.* Managers of the Metropolitan Asylum District - - - - - 433

—— Injunction—Jurisdiction of county court
See County Court. 3. [491

OWNER—Incumbent of church not owner within the meaning of the Metropolitan Building Act, 1855 - - - 75
See Metropolitan Building Act.
—— Under Local Government Acts—Change of ownership before completion of works
See Local Government Acts. 2. [305

PASSENGER — Railway — Travelling without having previously paid fare - 337
See Railway.

PERJURY—Illegal issue of warrant—Jurisdiction of justices - - - - 614
See Criminal Law.

PHARMACY ACT, 1868 (31 & 32 *Vict. c.* 121), *ss.* 1, 15 — *Corporation acting as Chemist and Druggist—Liability to Penalties—"Person."*] In sects. 1, 15 of the Pharmacy Act, 1868 (31 & 32 Vict. c. 121)—which prohibit under a penalty any person, not being a duly registered pharmaceutical chemist, &c., from keeping open shop for the sale of poisons or using the name of chemist or druggist . . .—the word "person" includes a corporation, and the penalty may be recovered from an incorporated company for keeping a chemist's shop as described in the Act, although the business of such shop is managed by duly registered chemists as servants of the company. Pharmaceutical Society of Great Britain *v.* London and Provincial Supply Association - - 313

PLAINTIFF—Addition of—Assignor and assignee of chose in action - - - 280
See Practice. 3.

POOR LAW—*Settlement—Lunatic—Prisoner acquitted on Ground of Insanity, Maintenance of—3 & 4 Vict. c.* 54, *s.* 7.] The parish upon which an order of maintenance may be made under 3 & 4 Vict. c. 54, s. 7, in respect of a person acquitted of felony on the ground of insanity and ordered to be detained in an asylum during her Majesty's pleasure, is the parish of such person's settlement at the time of the making of the order of maintenance, not at the time of the lunatic's reception into custody, or the order for removal to an asylum by the Secretary of State.—Consequently, where an order of maintenance was made upon a parish in which the husband of such a lunatic as above mentioned had acquired a settlement subsequently to the detention of the lunatic:—*Held*, that the order was rightly so made. Barton Regis Union *v.* County of Berks - - - 37

2. —— *Settlement by Residence—Divided Parishes Act* (39 & 40 *Vict. c.* 61), *s.* 34—*Child under Seven.*] The pauper was the illegitimate child of C. W., a single woman, and was born in the parish of R. When the child was about a fortnight old it was placed by its mother in the care of J. O. and his wife, who resided with it for the term of six years in the parish of S.:—*Held*, that under 39 & 40 Vict. c. 61, s. 34, which enacts that "where any person shall have resided for the term of three years in any parish in such manner and under such circumstances as would, in accordance with the statutes in that behalf, render him irremoveable, he shall be deemed to be settled therein," &c., the sessions were justified in finding that the pauper was settled in S. The Queen *v.* Leeds Union - - - - - - 323

POOR LAW—*continued.*

3. —— *Settlement—The Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 35—*Abolition of Derivative Settlement.*] A pauper was born in the parish of P. The pauper's father was born in the parish of D. Neither the pauper nor the pauper's father had acquired a settlement. The pauper's paternal grandfather had acquired a settlement by serving the office of parish constable in the parish of M., while the father of the pauper was under sixteen years of age and unemancipated:—*Held*, that under the 35th section of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), the pauper was not settled in the parish of D., but must be deemed to be settled in the parish of P. Woodstock Union *v.* St. Pancras - - - - - - 1

4. —— *Settlement—Illegitimate Child under Sixteen—Derivative Settlement*—39 & 40 *Vict. c.* 61, *s.* 35.] Under the Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 35, an illegimate child under sixteen does not take the settlement of its mother where such settlement has been derived from her marriage. Overseers of Manchester *v.* Guardians of St. Pancras - 409

POOR RATE — *Assessment Committee cannot be sued—Rating Appeal—Reference to Arbitration—Costs of Reference and Award*—25 & 26 *Vict. c.* 103, *s.* 20.] An assessment committee being respondents in an appeal against a poor-rate, an agreement was entered into which was expressed to be made between the appellants and the assessment committee for and on behalf of the guardians, and by which the rateable value of the subject-matter of the rate was referred to arbitration, the costs of the reference and award to be in the discretion of the arbitrators. The award was in favour of the appellants, and directed the "other party" to pay the appellants' costs of the reference and the costs of the award:—*Held*, that an action would not lie against the assessment committee to recover these costs. Leicester Waterworks *v.* Nuttall - - - 18

2. —— *Appeal — Valuation List — Objection made to List before making of Rate—Union Assessment Committee Act*, 1862 (25 & 26 *Vict. c.* 103) *—Union Assessment Committee Amendment Act*, 1864 (27 & 28 *Vict. c.* 39, *s*, 1.] By 27 & 28 Vict. c. 39, s. 1, it is enacted that no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list unless he shall have given the assessment committee notice of objection against the list and shall have failed to obtain such relief in the matter as he deems just.—An appellant who has given notice of objection to the valuation list and failed to obtain relief before a rate is made in conformity with the list is not bound by the above enactment to give a fresh notice of objection to the list after the rate is made in order to be entitled to appeal. The Queen *v.* Justices of Wiltshire - - - - - 326

—— Waterworks—Increase in value of mains 309
See Valuation (Metropolis) Act.

PRACTICE — *Appeal — Jurisdiction of Court of Appeal—Special Case stated by Umpire under the Lands Clauses Consolidation Act*, 1845—*Order of*

PRACTICE—*continued.*

High Court—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *ss*, 5, 32—*Supreme Court of Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 19—*Mine—Grant of Right of Way unconnected with working of Mines—Grant of "Waggon or Cart Road," whether it confers Right to lay down Railroad or Tramway—Mining Lease—Power to lay Railway to carry away Coals, the Produce of the Mines demised or any other Mines.*] The Court of Appeal has jurisdiction to entertain an appeal from the decision of the High Court of Justice upon a special case stated by an umpire appointed under the Lands Clauses Consolidation Act, 1845, to assess the compensation for lands taken for the purposes of an undertaking, or injured by the execution of the works thereof. — *Rhodes* v. *Airedale Drainage Commissioners* (1 C. P. D. 402) commented upon and followed.—H., being the owner of certain land and the mines thereunder, by indenture conveyed the surface to C.; but he excepted and reserved a "waggon or cart road" of the width of eighteen feet, to be at all times thereafter kept in repair at his own costs and charges:—*Held*, that these words would not enable H. to lay down a railroad or tramway for the carriage of coals raised from neighbouring collieries belonging to him.—*Senhouse* v. *Christian* (1 T. R. 560), *Durham and Sunderland Ry. Co.* v. *Walker* (2 Q. B., 940) *Dand* v. *Kingscote* (6 M. & W. 174), distinguished.—By a lease of mines the lessees were authorized to take and use "full and sufficient rail and other ways, paths, and passages to and for the said lessees and their agents, servants, and workmen, or others," to carry away "all or any of the coal, cannel, slack, iron, and ironstone, the produce of the mines thereby demised or any other mines":—*Held*, that the lessees, by virtue of this clause, might lay down a railway for the carriage of coals raised by them from the pits of adjoining collieries worked by them, and that they were not restricted to using the railway for the carriage of coals raised by or through the pits of the mines demised to them by the above-mentioned lease. BIDDER *v.* NORTH STAFFORDSHIRE RAILWAY COMPANY [C. A. 412

2. —— *Appeal from Master at Chambers, Time for—Order LIV., rule* 4.] In order that at appeal from a master to a judge at chambers may be in time, according to Order LIV., rule 4, it is not sufficient that the appeal summons should be taken out within four days from the master's decision, but it must be made returnable within the four days. BELL *v.* NORTH STAFFORDSHIRE RAILWAY COMPANY - - - - - 205

3. —— *Application to add Plaintiff—Order XVI., rule* 2—*Assignor and Assignee of Chose in Action—Indemnity, when required.*] In an action by the equitable assignee of a debt, or chose in action, an application under Order XVI., rule 2, to add the name of the assignor as plaintiff, will only be granted upon proof of his consent, or that he has been communicated with and all terms necessary for his protection from liability offered to him. TURQUAND *v.* FEARON - - 280

4. —— *Attachment of Debts — Order not equivalent to Judgment—Order XLII., rule* 20—*Order XLV., rule* 2.] An order dismissing an action with costs for want of prosecution is not enforceable by attachment of debts under Order XLV., rule 2. CREMETTI *v.* CROM - - 225

5. —— *Costs — Common Carriers — Action against Railway Company for Loss of Goods—County Courts Act*, 1867 (30 & 31 *Vict. c.* 142), *s.* 5—*Supreme Court of Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 67.] Claim alleged that the plaintiffs caused to be delivered to the defendants, as common carriers of goods for hire, a parcel of goods to be carried from S. to D. for reward to the defendants, but that the defendants did not safely and securely carry and deliver the same, but so carelessly conducted themselves that it was lost. The defendants paid 12*l.* 3*s.* 4*d.* into court, which the plaintiffs accepted in satisfaction of their claim:—*Held*, that the action was "founded on contract" within the meaning of the County Courts Act, 1867, s. 5, and that the plaintiff was not entitled to costs.—*Pontifex* v. *Midland Ry. Co.* (3 Q. B. D. 23) distinguished. FLEMING *v.* MANCHESTER AND SHEFFIELD RAILWAY COMPANY [81

6. —— *Costs—Money paid into Court—Acceptance of in Satisfaction—Order XXX., rule* 4; *Order LV., rule* 1.] The defendant paid money into court in satisfaction of the plaintiff's claim, and gave notice of such payment to the plaintiff. The plaintiff did not give notice to the defendant that he accepted the money so paid in satisfaction of the claim within four days, as required by Order XXX., rule 4, but he afterwards accepted that sum in satisfaction:—*Held*, that an order might be made giving the plaintiff his costs under Order LV., rule 1. GREAVES *v.* FLEMING - 226

7. —— *Costs—Power of Judge to order successful Plaintiff to pay Defendant's Costs—Costs of Former Trial—Rules of the Supreme Court, Order LV.*] A judge has power to order a plaintiff who recovers a nominal sum to pay the defendant's costs, even when the action is tried before a jury.—In an action to recover a sum of 85*l.* and also a sum of 6*s.* the plaintiff was nonsuited; a new trial having been ordered, at the second trial which took place before a jury, he failed as to his claim for 85*l.*, but proved his claim for 6*s.* The judge ordered that the plaintiff should pay the costs of both trials:—*Held*, that the order was right, and could not be set aside. HARRIS *v.* PETHERICK - - C. A. 611

8. —— *Costs—Rules of Court*, 1875, *Order LV.—Jurisdiction of Divisional Court to entertain an Application for Costs after Trial.*] The Divisional Court has under Order LV., an original jurisdiction to make an order to deprive a successful party of the costs of an action tried before a jury. SIDDONS *v.* LAWRENCE - - 95; C. A. 459

9. —— *Discontinuance of Action — Order XXIII., rule* 1—*Discretion.*] After an action had been referred to an arbitrator to state a special case, and he had in the case found the facts with regard to all but a very small portion of the claim in the defendant's favour, the plaintiff applied under Order XXIII., rule 1, for leave to discontinue the action:—*Held*, that leave ought not to be granted. STAHLSCHMIDT *v.* WALFORD [217

PRACTICE—*continued.*

10. —— *Discovery of Documents—Privilege—Identification—Description in Affidavit—Rules of the Supreme Court, Order XXXI., rules* 12, 13.] The plaintiff having obtained an order for the discovery of documents, the defendant, in his affidavit, objected to produce "certain documents, letters, and correspondence, which have passed between my legal advisers and myself," and "certain instructions to and opinions of counsel," which "are numbered 50 to 76 inclusive, and are tied up in a bundle marked with the letter A and initialed by me":—*Held*, that the documents were sufficiently described, and that the plaintiff could not be compelled to further identify them. Taylor *v.* Batten - - - C. A. 85

11. —— *Dismissing Action for Want of Prosecution — Security for Costs — Order XXIX., rule* 1.] The plaintiff was ordered to give security for costs, the action being stayed in the meantime; but he failed to do so.—The defendant applied to dismiss the action for want of prosecution, under Order XXIX., rule 1:—*Held*, that the judge had a discretion to make an order dismissing the action, though the defendant had not abandoned the order for security for costs. La Grange *v.* McAndrew - - - 210

12. —— *Dismissal of Action for want of Prosecution — Order XXIX., rule* 1 — *Summons to extend Time for delivery of Statement of Claim—Adjournment by Consent.*] An order having been made on the 6th of May dismissing the action for want of prosecution if the statement of claim were not delivered within fourteen days, on the 19th of May the plaintiff took out a summons returnable the next day, the last of the fourteen days, for further time to deliver statement of claim. The summons was, on the 20th, adjourned, by the consent of the parties in writing indorsed thereon, till the 21st, and on the 21st a master made an order giving seven days more for delivery of statement of claim. Pollock, B., having rescinded the order of the master on the ground that he had no jurisdiction, the action being at an end on the 20th of May:—*Held*, that the decision of the learned judge was correct. King *v.* Davenport [402

13. —— *Interrogatories, Striking out—Irrelevance—Order XXXI., rule* 5—*Rules of November*, 1878.] Objections to particular interrogatories on the ground of irrelevance, or that they seek discovery of the other party's evidence, must be taken in the affidavit in answer, and do not afford ground for setting aside the interrogatories. Gay *v.* Labouchere - - - - 206

14. —— *Pleading — Embarrassing Statement of Claim—Action for the Recovery of Land—Title, General Allegation of Plaintiffs—Rules of Supreme Court, Order XXVII., rule* 1.] In an action for the recovery of land of which the plaintiff has never been in possession, the statement of claim must allege the nature of the deeds and documents upon which he relies in deducing his title from the person under whom he claims; and a general statement, that by assurances, wills, documents, and Crown grants in the possession of the defendants, without further describing them, the plaintiff is entitled to the land, is embarrassing, and liable to be struck out under the Rules of the

PRACTICE—*continued.*

Supreme Court, Order XXVII., rule 1. Philipps *v.* Philipps - - - - C. A. 127

15. —— *Procedure — Charging Order under 1 & 2 Vict. c.* 110, *ss.* 14, 15—*Judicature Act*, 1875, *Order L.—Death of Judgment Debtor—Power to continue Proceedings.*] An order charging stock under 1 & 2 Vict. c. 110, ss. 14, 15, cannot be made absolute where it appears that the judgment debtor was dead when the order nisi was obtained. Finney *v.* Hinde 102

16. —— *Security for Costs—Foreigner residing temporarily in England.*] A foreigner usually residing abroad, who is temporarily residing in England for the purpose of enforcing a claim by action, cannot be called upon to give security for costs. Redondo *v.* Chaytor - - C. A. 453

17. —— *Procedure — Transfer of Action to Chancery Division—Counter-claim for Rectification of Deed and Specific Performance—Judicature Act*, 1873, *s.* 34, *Rules of Court, Order LI., rule* 2.] The vendor of a piece of land brought an action in the Queen's Bench Division against the purchaser for trespassing on an adjoining piece of land.—The defendant alleged in his defence, that the plaintiff had agreed to grant him a right of way over the last-mentioned piece of land, and delivered a counter-claim claiming rectification of the deed of conveyance by inserting a grant of such right of way. He also claimed specific performance of an alleged agreement to sell him another adjoining piece of land. The defendant then moved to transfer the action to the Chancery Division:—*Held*, affirming the decision of the Queen's Bench Divisional Court, that the relief asked by the counter-claim was not a sufficient ground for transferring the action to the Chancery Division.—*Quære*, whether the Court of Appeal has power to order the transfer of an action without the consent of the president of the Division from which it is to be transferred. Storey *v.* Waddle - - - - C. A. 289

PRINCIPAL AND AGENT—Contract made with agent of lunatic - - - 661
See Lunatic.

—— Stock-broker—Payment on account of "time bargains" - - - - 685
See Stock Exchange.

PRISONER—Expense of clothing for admission into reformatory - - - 320
See Reformatory School.

—— Lunatic—Maintenance - - 37
See Poor Law. 1.

PROPERTY TAX—*Landlord and Tenant—Deduction from Rent—*5 *&* 6 *Vict. c.* 35—*Contract—Illegality.*] An agreement that, if the tenant will continue to pay his rent in full without any deduction in respect of landlord's property tax paid by him, the landlord will repay to the tenant all sums which he has paid or shall pay for the landlord's property tax, is not invalid as being contrary to the provisions of 5 & 6 Vict. c. 35.—Judgment of the Queen's Bench Division (4 Q. B. D. 220), affirmed. Lamb *v.* Brewster 220; C. A. 607

RAILWAY—*Travelling without having previously paid Fare—Intent to avoid Payment of Fare—Railways Clauses Consolidation Act*, 1845 (8 *Vict.*

RAILWAY—*continued.*
c. 20), *s.* 103.] The respondent who was travelling on the G. W. Railway in a train going to N. produced the "forward half" of a tourist return ticket from L. to N. and back. This ticket had been originally issued to another person and was stated on the back thereof to be not transferable. The original taker had used the ticket as far as H. on the way from L. to N., but then proceeded on a different route and, consequently not having given up the forward half of the ticket, sold it to the respondent who was travelling with it between H. and N.:—*Held*, that the respondent was liable to be convicted under 8 & 9 Vict. c. 20, s. 103, for travelling without having previously paid his fare with intent to avoid payment thereof. Langdon *v.* Howells - 337

—— At what value assessable—Rate for sanitary purposes - - - - 141
See Local Government Acts. 1.

—— Carrier by—Action for loss of goods through negligence—"Founded on contract"—County Courts Act, 1867, s. 5 - 81
See Practice. 5.

RATE, DISTRICT—Expenses not incurred for equal benefit of whole parish - 389
See Metropolis Management Act.

RECOGNIZANCE—To be entered into "immediately"—Default—Appeal to sessions
See Licensing Act. [469

RECOVERY OF LAND—Pleading—General statement of title - - - 127
See Practice. 14.

REFORMATORY SCHOOL—*Expenses of providing Clothing requisite for a Prisoner's Admission—Reformatory Schools Act*, 1866 (29 & 30 *Vict. c.* 117), *s.* 23—*Prison Act*, 1877 (40 & 41 *Vict. c.* 21), *s.* 4.] By the Prison Act, 1877, the "prison authority is relieved from the obligation of defraying the expense of clothing requisite for the admission of a youthful offender to a reformatory school under the Reformatory Schools Act, 1866, s. 23, and such expense must be provided for under s. 4 of the Prison Act, 1877. The Prison Commissioners *v.* The Corporation of Liverpool [329

RENT—Agreement to pay—Entry, how far a condition of liability - - 480
See Landlord and Tenant.

—— Property tax—Omission to deduct from
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RESTRAINT OF PRINCES—Charterparty void or voidable in event of war - - 462
See Insurance, Marine. 1.

RULES—Order XVI., r. 2 - - - 280
See Practice. 3.

—— **Order XXIII., r. 1** - - - 217
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—— **Order XXVII., r. 1** - - - 127
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See Practice. 13.

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—— —— - - - - - 371
See Liverpool Passage Court.

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See Practice. 7.

—— **Order LVII. [1876]** - - - 95
See Practice. 8.

SALE OF GOODS—*Delivery by Monthly Instalments — Clauses entitling Seller to suspend, or excusing him from making Deliveries—Right to rescind—Duration of Contract.*] By agreement between the plaintiffs and the defendants, the plaintiffs, who were merchants at Bilbao, undertook to supply the defendants at Workington, Cumberland, with about 30,000 tons of Sommorostro ore at the price of 25*s.* 6*d.* per ton, cost freight and insurance, payment to be made by cash on delivery of each shipment "Deliveries to be made at the rate of from 800 to 1300 tons per month, provided we (plaintiffs) are able to procure tonnage at or under the rate of 16*s.* 6*d.* per ton. No responsibility to attach to us should we be prevented from delivering all or any portion of the ore, through any dangers and accidents of the mines, railway shoots, rivers, seas, and navigation of whatever nature or kind, or through any circumstances beyond our own control:"—*Held*, first, that the plaintiffs were entitled to deliver quantities of the ore which they had previously withheld while freights were above the limit, provided such deliveries were made within a reasonable time, having regard to the contemplated duration of the contract, the means which they had to make up arrears, &c.; secondly, that they were not entitled to deliver quantities which they had previously been prevented from delivering from dangers and accidents of the mines, &c., such quantities being as much struck out of the contract as if they had been actually delivered. De Oleaga *v.* West Cumberland Iron and Steel Company - 472

2. —— *Tender of Goods not in accordance with Contract—Subsequent Tender of Goods in accordance with Contract.*] The defendants agreed to buy of the plaintiffs a cargo of maize. The plaintiffs tendered the cargo of the *C.*, which the defendants refused to accept, upon the ground that the shipping documents were not tendered with it. The plaintiffs insisted that the tender was valid. This dispute was referred to an arbitrator, who decided that the tender was invalid. The plaintiffs

SALE OF GOODS—*continued.*
thereupon, and within the time limited by the contract, tendered the cargo of the *M.*, which the defendants refused to accept upon the ground that they were not bound to accept any cargo in substitution for that of the *C.*, the tender of which the arbitrator had decided to be invalid:—*Held*, that the defendants were bound to accept the cargo of the *M.*, and might be sued by the plaintiffs to recover any loss which the latter might have sustained through the refusal to accept it. Borrowman *v.* Free - - - C. A. 500

3. —— *Fraud, Contract induced by—Passing of Property—Conviction for False Pretences, Effect of, under* 24 & 25 *Vict. c.* 96, *s.* 100—*On Conviction "the property shall be restored."*] By 24 & 25 Vict. c. 96, s. 100, if any person guilty (inter alia) of obtaining any chattel, money, or other property by false pretences "shall be indicted on behalf of the owner of the property and convicted, in such case the property shall be restored to the owner."—W. purchased and obtained delivery of certain sheep from the defendant by false pretences. The plaintiff purchased the sheep from W. and paid W. for them without knowledge of the fraud, the defendant having done nothing in the meantime to avoid the contract between himself and W. The defendant finding that the sheep were on the plaintiff's premises retook possession of them; W. having been convicted of obtaining the sheep by false pretences on the prosecution of the defendant:—*Held*, that the effect of 24 & 25 Vict. c. 96, s. 100, was not to revest the property in the sheep in the defendant as against the plaintiff, who had acquired a good title to them before the conviction, and consequently that the defendant was liable in an action by the plaintiff for the value of the sheep. Moyce *v.* Newington - - 32

4. —— *Purchaser or Pledgee, Right of Innocent, where Property procured by Vendor or Pledgor by Fraud—Fraud, which of Two Innocent Parties to suffer by—Pledge—Property revested by Pledgee in Pledgor through Fraud of the latter.*] The plaintiffs made advances to D. & Sons on the security of certain flour, the following memorandum being signed by D. & Sons: "As security for the due fulfilment on our part of this undertaking, we have warehoused in your name sundry lots of flour, and in consideration of your delivering to us or our order said flour as sold, we further undertake to specifically pay you proceeds of all sales thereof immediately on their receipt." The flour was warehoused in the plaintiffs' name. The defendants subsequently made advances to D. & Sons on the security of a pledge of the flour, in ignorance of the prior transaction with the plaintiffs; and D. & Sons, by a fraudulent representation that they had sold the flour to the defendants, procured from the plaintiffs a delivery order for the flour, which they gave to the defendants. The defendants, in pursuance of the delivery order, obtained possession of the flour, and, the advances made by them not being repaid, sold it. The plaintiffs sued the defendants for the conversion of the flour:—*Held*, that (assuming that the plaintiffs had originally a special property in the flour), the intention of the plaintiffs must be taken to have been to revest the whole property in the flour in D. & Sons, in order that they might transfer it to the defendants as purchasers; and that, though the plaintiffs might have revoked the delivery order as being procured by fraud, as long as the flour remained in the hands of D. & Sons, yet when the property in the flour had been transferred by D. & Sons to bonâ fide transferees for good consideration, the title of the latter was indefeasible:—*Held*, also, that of two innocent parties, one of which must suffer, the plaintiffs having enabled D. & Sons to commit the fraud on the defendants, must suffer the consequences, and that, consequently, the action was not maintainable. Babcock *v.* Lawson - - - 394

SALMON FISHERY—Salmon Fishery Act, 1861—Fishing mill dam - - 24
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—— Children employed in factory—Bye-laws 241
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—— Member losing office through six months' absence—Eligible for re-election - 79
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See Cases under Poor Law.

SEWER—Liability of owner of premises for expenses incurred by local board - 305
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SHIP—*General Average—Practice of Average Adjusters—Putting into Port of Refuge to repair—Expense of reshipping Cargo and leaving Port of Refuge.*] A ship on her voyage with cargo to Liverpool encountering severe weather, the foretopmast had to be cut away and in its fall caused other damage to the ship, which was thereby compelled to put into port to repair. In order to effect the repairs, and to enable the ship to proceed on her voyage, it was necessary to discharge a portion of the cargo, and expense was incurred in landing and warehousing it. The repairs having been effected expense was incurred in reshipping such portion of the cargo. Further expense was incurred for pilotage and other charges in respect of the ship's leaving the port of refuge and proceeding upon her voyage. The ship ultimately reached her destination in safety. It has been for from seventy to eighty years the practice of English average adjusters in adjusting losses where ships have put into port to refit, whether such putting into port has been occasioned by a general average sacrifice, or a particular average loss, to treat the expense of discharging the cargo as general average, but the expense of warehousing it as particular average on the cargo, and the expense of reshipment of the cargo and pilotage, port charges, and other expenses incurred to enable the ship to proceed on her voyage as particular

SHIP—*continued.*

average upon the freight. The owners of the ship claimed to have the above-mentioned expenses of warehousing and reshipment of cargo, and the pilotage and other expenses of leaving the port, treated as matter of general average, and sued the owners of the cargo for contribution in respect thereof:—*Held* (by Cockburn, C.J., and Mellor, J., Manisty, J., dissenting) that the plaintiffs were entitled to recover on the ground that the expenses were all incurred in furtherance of the common purpose of prosecuting the adventure, and for the benefit of the cargo as well as the ship.—By Manisty, J., the above mentioned practice of average adjusters having existed for so long a period must be deemed to be the general mercantile usage of this country, and as such to have the force of law. Atwood *v.* Sellar - - 342

2. —— *Bill of Lading, implied Obligation in, to unload Ship in reasonable Time—Bills of Lading Act*, 1855 (18 & 19 *Vict. c.* 111.] By a charterparty entered into between the plaintiff and G. it was agreed that the plaintiff's vessel should at the port of discharge be unloaded as fast as the custom of the port would allow. By the bill of lading, signed by the master, the cargo was stated to have been shipped by G. and was to be delivered to the defendant or his assigns, he or they paying freight for the goods as per charterparty. No time for the discharge of the cargo was mentioned in the bill of lading. At the port of discharge there was no custom as to unloading vessels, but a delay occurred in unloading the ship. The defendant never assigned the bill of lading, but before the arrival of the ship he sold the cargo, and the ultimate purchaser took delivery of it upon an order signed by the defendant:—*Held*, 1. That, as there was no custom of the port of discharge as to unloading vessels, the charterparty did not by its terms vary the implied contract contained in the bill of lading to deliver the cargo within a reasonable time; 2. That the defendant, although he had parted with the beneficial interest in the cargo, was when the delay occurred a "consignee" within the Bills of Lading Act, 1855. Fowler *v.* Knoop C. A. 299

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—— Shilling damages in action for—Costs—Liverpool Passage Court - - 371
See Liverpool Passage Court.

SOLICITOR AND CLIENT—*Uncertificated Solicitor—Costs—Not recoverable by Client against Opposite Party—37 & 38 Vict. c. 68, s. 12.*] Under the Attorneys and Solicitors Act, 1874 (37 & 38 Vict. c. 68), s. 12—which enacts that no costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as an attorney or solicitor without being duly qualified so to act shall be recoverable in any action, suit, or matter by any person or persons whomsoever—the successful party in a legal proceeding cannot, where the solicitor employed by him was uncertificated, recover his costs and disbursements from the party otherwise liable. Fowler *v.* Monmouthshire Railway Canal Company - - - - - 334

SONGS—Right to exclusive performance of—Copyright - - - - 483
See Copyright.

STATUTE—*Construction of—Time of coming into Operation—Bastardy—35 & 36 Vict. c. 65, s. 3: 36 Vict. c. 9, s. 3.*] The 35 & 36 Vict. c. 65, s. 3, provides for an application for an order of affiliation by any single woman who may be delivered of a bastard child "after the passing of this Act." The Act, which came into immediate operation, received the royal assent on the 10th of August, 1872:—*Held*, that an order of affiliation might be made under the Act in respect of a child born at any time of the day on the 10th of August, 1872, inasmuch as the Act in contemplation of law for this purpose came into effect from the commencement of the day on which it received the royal assent. Tomlinson *v.* Bullock - - 260

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STOCK EXCHANGE—*Broker and Principal—Payment of "Differences"—Illegal Contract at Common Law—Gaming and Wagering Contract 8 & 9 Vict. c.* 109, *s.* 18—"*Time-Bargains.*"] The plaintiff, a broker, was employed by the defendant to speculate for him upon the Stock Exchange: to the knowledge of the plaintiff the defendant did not intend to accept the stock bought for him, or to deliver the stock sold for him, but expected that the plaintiff would so arrange matters that nothing but differences should be payable by him; the plaintiff knew that unless he could arrange matters for the defendant as the latter expected, the defendant would be unable to meet the engagements which the plaintiff might enter into for him. The plaintiff accordingly entered into contracts on

STOCK EXCHANGE—*continued.*
behalf of the defendant, upon which the plaintiff became personally liable; and he sued the defendant for indemnity against the liability incurred by him and for commission as broker:—*Held*, that the plaintiff was entitled to recover: for the employment of the plaintiff by the defendant was not against public policy, and was not illegal at common law, and, further, was not in the nature of a gaming and wagering contract against the provisions of 8 & 9 Vict. c. 109, s. 18. THACKER *v.* HARDY - - - - - C. A. 685

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SUPPORT—*Lateral Support of House by adjoining Soil—Twenty Years' uninterrupted Enjoyment without Grant by adjoining Owner—Presumption of Grant made and lost in Modern Times—Prescription Act* (2 & 3 *Wm.* 4, *c.* 71)—*Employer and Contractor—Liability of Employer for Injury caused to neighbouring Property by the Execution of Work dangerous in its Nature.*] The right to the support of a building by the adjacent soil of an adjacent owner is not a natural right of property; it is an easement which may be acquired by prescription from the time of legal memory, or by grant express or implied, but it is not an easement within the Prescription Act (2 & 3 Wm. 4, c. 71.) It may also be acquired by the circumstance that the building has stood for twenty years, if during that period the owner of the adjacent soil knew or might have known that the building was thereby supported, and if he was capable of making a grant; and by (Cotton and Thesiger, L.JJ., as to this Brett, L.J., dissenting) after twenty years' enjoyment in point of fact of the support to the building the claim to it as matter of right will not be defeated by proof that no grant of the easement was ever made.—By Cotton and Thesiger, L.JJ., affirming *Bower* v. *Peate* (1 Q. B. D. 321), where a contractor has been employed to do work which in its nature is dangerous to a neigbouring property and damage results from the work, the employer is liable to compensate the owner of the neighbouring property, although the contractor is competent and he has been directed by the employer to take proper precautions in executing the work.—For more than twenty years before 1849 two dwelling houses of considerable age had stood side by side; in that year one of them was converted into a factory, the internal walls being removed, and the girders, which supported the upper floors of the factory, being let into a large chimney-stack, the foundations of which being in contact with the soil under the adjoining house the lateral pressure upon that soil was materially increased. The owner of the adjoining house did not assent to these alterations. The plaintiffs became possessed of the factory, and after it had stood for twenty-seven years the defendants C. contracted with the defendant D. to pull

SUPPORT—*continued.*
down the adjoining house and to excavate the soil forming its site. D. employed N. to do the excavations; in consequence of these excavations, which, however, were not done negligently, the foundations of the chimney-stack of the plaintiffs' factory, being deprived of the support of the adjacent soil, gave way. An action having been brought to recover damages for excavating without leaving sufficient support to the chimney-stack, the foregoing facts were proved, but it did not appear that the owner of the house pulled down by the defendants had been aware of the precise nature of the alterations made when the building occupied by the plaintiffs had been converted into a factory, and it was admitted that since the conversion he had not by deed granted any easement of support in respect of the factory. At the close of the plaintiffs' case, the judge held that the defendants C. and D. were liable for the acts of N., and that as more than twenty years had elapsed since the conversion of the building occupied by the plaintiffs into a factory, it had acquired an absolute right to the support of the adjacent land, whether or not the owner of the house pulled down by the defendants had had notice of the alterations, and that the right of support did not depend upon the implication of a grant, and he directed the jury to find for the plaintiffs:—*Held*, by Cotton and Thesiger, L.JJ., overruling the judgment of the majority of the Queen's Bench Division, Brett, L.J., dissenting, that upon these facts the defendants were not entitled to judgment, for the enjoyment during more than twenty years of the support in point of fact raised a presumption that the occupiers of the plaintiffs' factory were entitled thereto as matter of right, and the circumstance that no grant of the easement of support had been made was not material; but that the defendants were entitled to a new trial on the ground that they might rebut the presumption by evidence either that the owner of the house pulled down by the defendants did not know the nature of the alterations made when the building occupied by the plaintiffs was converted into a factory, or that he was incapable of making a grant.—By Brett, L.J., that as it had been admitted that no grant by deed of the right of support for the factory had ever been made, no easement had been acquired from the enjoyment in fact for twenty years of the support of the adjacent soil, and that the defendants were entitled to judgment. ANGUS *v.* DALTON - C. A. 162

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